Sunland Construction Co., Inc. ***and*** **International Brotherhood of Boilermakers Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO.** Cases 15–CA–10618–1, 15–CA–10618–2, and 15–CA–10618–3

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 5, 1989, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Union filed cross-exceptions and supporting briefs, and the Union filed a brief in response to the Respondent's exceptions.

On January 22, 1992, the Board scheduled oral argument because this case raised important Section 8(a)(3) and (1) issues with respect to whether paid union organizers are ''employees'' within the meaning of the Act, if so, whether it violates the Act to refuse to hire a paid organizer and, even if that is so, whether it is unlawful to refuse to hire the organizer while the Union for which he organizes is on strike.[1] On March 18, 1992, the Respondent, the General Counsel, and the Charging Party Union, and, as amici curiae, the American Federation of Labor and Congress of Industrial Organizations and its Building and Construction Trades Department, AFL–CIO, the Chamber of Commerce of the United States of America, the Associated General Contractors of America, Inc., and the Associated Builders and Contractors Inc., presented oral argument before the Board. The Union and the amici also filed briefs.[2] The Board has considered the decision and the record in light of the exceptions, briefs, and oral argument, and has decided to affirm the judge's rulings, findings,[3] and conclusions.[4]

I. BACKGROUND

A. *Facts*

The Respondent overhauls boilers. In 1987, the Respondent contracted to overhaul a boiler at the James River Paper Mill in St. Francisville, Louisiana. The overhaul was scheduled to begin in late November 1987 and conclude 6 months later. After the Union learned of the St. Francisville job, it presented the Respondent with approximately 90 applications from union members for boilermaker/welder positions. These applications, which were presented to the Respondent in four batches beginning March 9, 1988, were solicited by the Union at its hiring hall. Included among the ''batches'' were applications from general organizer William Creeden and International Representative Anthony Yakomowicz. They are full-time, paid union organizers with experience as journeymen in the pipefitter/welder trade.[5] None of the ''batched'' applicants was hired, although the Respondent subsequently hired welders and boilermakers for the St. Francisville project.

On April 19, 1988, the Union struck the Respondent's jobsite.[6] Two days later, Creeden, who participated in the strike, telephoned the Respondent about work and was told by Foreman Hollis that the Respondent desperately needed welders. After Creeden identified himself by name, Hollis, who knew that Creeden was affiliated with the Union, said he would have to talk to his supervisor.[7] Hollis instructed Creeden to call back. When Creeden did, Hollis informed him that no welders were being hired. Between April 21 and 25, 1988, however, the Respondent hired eight welders.

At the hearing, Creeden testified that if he had been offered employment by the Respondent, he would have accepted it and worked for an indefinite period.

B. *Judge's Findings*

The judge found, among other things, that the ''batched'' applicants were employees within the meaning of Section 2(3) of the Act who were engaged in the Section 7 right to ''form, join, or assist labor organizations'' and were entitled to protection under Section 8(a)(3). Relying on *H. B. Zachry Co.*, 289 NLRB 838 (1988), the judge concluded that the Respondent violated Section 8(a)(3) by refusing to hire the batched applicants, including paid union organizers

[1] Oral argument additionally was held in *Sunland Construction Co.*, Cases 15–CA–10927–2 et al., and *Town & Country Electric*, Cases 18–CA–11035 et al.

[2] The Chamber of Commerce did not file a brief.

[3] The parties have each excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge stated in sec. III,C,5, of his decision that Supervisor Broadwater was reprimanded by Superintendent Williford on April 14, 1988, that Broadwater held an employee meeting on April 15, and that employees Gibson and Bowman were discharged on April 16. The record indicates that these three events instead occurred on April 15, 16, and 17, respectively. We correct these errors and note that they do not affect the outcome of this case.

[4] In adopting the judge's finding that the Respondent unlawfully refused to hire the ''batched'' applicants, we leave to compliance the determination of how many welder, pipefitter, and boilermaker positions were available on the St. Francisville project after the Respondent began receiving batched applications on March 9, 1988.

[5] The qualifications of Creeden and Yakomowicz are not in dispute.

[6] The judge found, and we agree, that this was an unfair labor practice strike from its inception.

[7] Hollis' supervisor, Plant Superintendent Williford, admittedly knew that Creeden was affiliated with the Union prior to his April 21 request for work.

Creeden and Yakomowicz. In *Zachry*, the Board held that employers lawfully could not refuse to hire qualified individuals for the reason that they are paid, full-time union organizers.

The judge further concluded that the Respondent did not violate the Act by refusing to hire paid union organizer Creeden during the strike in response to his further request for work. The judge concluded that this allegation pushed *Zachry* ''to its breaking point'' and would compromise the Respondent's right to operate during a strike.[8]

C. *Exceptions*

The Respondent excepts, arguing that it refused to hire Creeden and Yakomowicz based on their ''batched'' applications and did not violate Section 8(a)(3). The Respondent notes that following the judge's decision, the Fourth Circuit Court of Appeals refused to enforce *Zachry*, finding that paid union organizers like Creeden and Yakomowicz are not statutory employees.[9] The Respondent urges the Board to reexamine its decision in *Zachry* in light of the Fourth Circuit's decision and find that paid union organizers are not entitled to protection as Section 2(3) employees because, among other things, employees cannot serve two masters.[10] Additionally, argues the Respondent, even if the Board finds that paid union organizers are Section 2(3) employees, its further refusal to hire Creeden, on April 21, during the strike should be found lawful. Thus, contends the Respondent, its right to maintain operations during a strike entitles it to ensure that strike replacements are loyal to its interests, and subject to its total direction and control. Finally, the Respondent argues that common sense dictates that Creeden's strike application was not genuine because ''[h]is employment would have been diametrically opposed to the strike's very purpose.''

The General Counsel and Union cross-except, urging the Board to adhere to its own decision in *Zachry* and arguing that the judge erroneously differentiated between paid organizers who apply during a strike and those who seek work at other times. The General Counsel further asserts that: (1) the judge's reliance on Mackay Radio is misplaced; (2) the evidence does not establish that the Respondent's operation would be ''seriously compromised'' if it were required to hire paid union organizers during the strike; and (3) there is no evidence that Creeden and Yakomowicz would not have been satisfactory employees if hired.[11]

II. ANALYSIS

A. *Overview*

We agree, for the reasons stated by the judge, that the Respondent violated Section 8(a)(3) and (1) by refusing, for discriminatory reasons, to hire union members for whom batched applications were submitted.[12] Additionally, for the reasons set forth below, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by refusing to hire full-time, paid union organizers Creeden and Yakomowicz who also submitted batched applications. In agreement with the judge, however, we find that the Respondent did not violate Section 8(a)(3) and (1) by refusing to hire Creeden during the strike.

B. *Paid Union Organizers As ''Employees'' Within The Meaning of Section 2(3)*

1. The definition of ''employee''

We begin our analysis recognizing that applicants are ''employees.'' *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). As applicants are ''employees,'' the question is whether paid union organizer applicants are employees.

Congress, in 1935, broadly defined ''employee'' in Section 2(3), providing that:

> The term ''employee'' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment

The word ''employee'' both in common usage and in the law ordinarily includes individuals concurrently working for different employers. ''Employee'' commonly refers to individuals ''employed by another,'' ''under wages or salary,''[13] without reference to any requirement that they be employed by only a single employer. Similarly, a standard legal definition of ''employee'' encompasses any ''person in the service of another under any contract of hire, express or im-

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[8] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[9] *H. B. Zachry v. NLRB*, 886 F.2d 70 (1989).

[10] The Respondent additionally relies on former Member Kennedy's dissent in *Oak Apparel*, 218 NLRB 701, 702 (1975), and the administrative law judge's dictum in *Anthony Forest Products*, 231 NLRB 976, 978 fn. 6 (1977), for this proposition.

[11] The General Counsel notes that unpaid union organizers Lindsey, Felter, Covington, and Davis, who organized under Creeden's direction, properly performed duties assigned them by the Respondent. Further, these unpaid organizers expressly informed the Respondent prior to beginning their organizing activities that they would not sabotage the Respondent's operation or slow down work.

[12] We disavow, however, the judge's discussion of the Union's motive for submitting the batched applications, as well as his conclusion that the Union's objective was to enmesh the Board in the Union's strategy.

[13] *Websters Third New International Dictionary*, 743 (rev. 1971). See also *Funk & Wagnalls Standard College Dictionary*, 433 (1973), which defines ''employee'' as ''one who works for another in return for salary, wages, or other consideration.''

plied, oral or written, where the employer has the power or right to control the employee in the material details of how the work is to be performed,'' without reference to, or proscription of, dual employment. *Black's Law Dictionary* 471 (rev. 5th ed. 1979). As long as union organizers employed by or seeking work with an employer do so for wages in return for assigned work, they meet the standard dictionary definition of ''employee.''

Giving Section 2(3), as amended, its ''ordinary meaning,''[14] we find that the definition of ''employee'' as ''any employee'' is sufficiently expansive to encompass paid union organizers.

2. Exclusions

Next we look to the exclusions in Section 2(3). Congress in 1935 excluded specific categories from its broad definition of ''employee,'' i.e., agricultural laborers and individuals performing domestic service in the home. In 1947, Congress added to the exclusions so that the Section 2(3) definition of ''employee'' now excludes:

> any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

''Paid union organizers'' do not appear in these exclusions. Under the well settled principle of statutory construction—expressio unius est exclusio alterius—only these enumerated classifications are excluded from the definition of ''employee.''[15] Accordingly, full-time, paid union organizers are ''employees'' within the ordinary meaning of this provision. See generally *State Bank of India v. NLRB*, 808 F.2d 526, 531–532 (7th Cir. 1986), cert. denied 483 U.S. 1005 (1987).

3. Legislative History

We must also look to the legislative history, however, because a statute will not be given its ordinary meaning if there is ''a clearly expressed legislative intention to the contrary.'' *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980). There is no evidence in the legislative history that Congress intended Section 2(3) to be more restrictive than the ordinary meaning of its terms. On the contrary, the legislative history reflects Congress' intent to expansively interpret ''employee.''

Although Congress did not specifically consider the status of union organizers when enacting Section 2(3), it expansively referred to ''employees'' as ''workers,'' ''wage earners,'' ''workmen,''[16] and ''every man on the payroll.''[17] Even when Congress amended Section 2(3) in 1947 specifically to exclude additional classifications from the definition of ''employee,'' it did not narrow the general definition of ''employee.'' Rather, Congress continued to describe ''employees'' inclusively as individuals ''work[ing] for another for hire,'' and ''work[ing] for wages and salaries under direct supervision.''[18]

Further, Congress reassessed and rebalanced the right of an employer to require undivided loyalty from some of its workers with respect to labor unions by its 1947 amendment of Section 2(3) excluding ''supervisors'' from the definition of ''employee.''[19] Had Congress concluded that paid organizers were not entitled to the protection afforded ''employees'' by the statute, it knew how to exclude them. It did not.

Under the broad terms employed by Congress when enacting and amending Section 2(3), paid organizers applying for work, or hired to work for wages under the employer's direct supervision, meet the requirements for statutory ''employee'' status.

4. Interpretations of Section 2(3)

a. *The Supreme Court*

Consistent with the inclusive language of Section 2(3), and Congress' expressed intent to expansively define ''employee,'' the Supreme Court has consistently interpreted 2(3) broadly to cover individuals not explicitly excluded. The seminal case is *Phelps Dodge Corp. v. NLRB*, supra, where the Supreme Court broadly interpreted the Act to include applicants for work as well as actual hires. The Court also rejected *Phelps Dodge*'s argument that certain strikers who had obtained employment elsewhere were not entitled to reinstatement because they were not statutory ''employees.'' Writing for the Court, Justice Frankfurter twice characterized the definition of ''employee'' in Section 2(3) as a ''broad'' one, which ''expressed the conviction of Congress 'that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee . . . .''' Id. at 192

[14] We assume that the statutory purpose is expressed by the ordinary meaning of its words. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

[15] 2A Singer, *Sutherland Statutory Construction*, Sec. 47.23 (4th ed. 1973) (Suppl. 1991).

[16] H.R. Rep. No. 969, 74th Cong., 2 Leg. Hist. 2917–18 (NLRA 1935).

[17] 2 Leg. Hist. 3119, 3220 (NLRA 1935).

[18] H.R. Rep. No. 245, 80th Cong., 1st Sess., 1 Leg. Hist. 309 (LMRA 1947).

[19] See *Florida Power & Light v. Electrical Workers Local 2164*, 417 U.S. 790, 807–811 (1974).

(quoting from H. R. Rep. No. 1147, 74th Cong., 1st Sess. p. 9). In these situations, emphasized Justice Frankfurter, ''to deny the Board power to wipe out the prior discrimination . . . would sanction a most effective way of defeating the right of self-organization.'' Id. at 193.

Following Congress' 1947 amendment of Section 2(3) to exclude supervisors, independent contractors, and others, the Supreme Court reaffirmed an expansive interpretation of ''employee.'' In *Chemical Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 166–168 (1971), the Supreme Court held that ''employee'' under Section 2(3) broadly covers those who work for another for hire, although not those who have retired. Similarly, in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984), the Court said that the ''breadth of 2(3)'s definition is striking: the Act squarely applies to 'any employee.' The only limitations are specific exemptions'' contained in the statute. In concluding that undocumented aliens were statutory ''employees,'' the Court relied not only on Section 2(3)'s broad language, but also on the conclusion that an expansive interpretation of the statute was consistent with ''the Act's avowed purpose of encouraging and protecting the collective-bargaining process.'' Id. at 892.

The Supreme Court's analysis of the word ''employee'' under the Employee Retirement Income Security Act (ERISA), a statute that also addresses work place issues, endorses the application of common law agency principles. Thus, in *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344, 1349 (1992), the Supreme Court, finding that ''employee'' under ERISA was ill defined, turned to the common law, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–740 (1989):

> [W]hen Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.

Only where employing traditional agency principles would thwart congressional intent or produce absurd results will the Court refuse to apply those principles. *Nationwide Mutual Insurance Co. v. Darden*, supra, 112 S.Ct. at 1349.

Under common-law agency principles:

> A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.

Restatement (Second) of Agency, Section 226, pp. 498–500 (1957).[20]

NLRA Section 2(3), like its ERISA counterpart, circuitously defines ''employee'' as ''any employee.'' There being no contrary congressional intent, we find no bar to applying common-law agency principles to the determination whether a paid union organizer is an ''employee.'' Under those principles, paid union organizers cannot be excluded from the definition of ''employee'' on the basis that they are paid by their union as well as by the employer they are attempting to organize.[21]

In sum, Supreme Court decisions support a reading of Section 2(3) that includes paid union organizers within the definition of employee.

b. *The Board*

Courts repeatedly have held that the task of determining ''the contours of the term 'employee' properly belongs to the Board.'' *Chemical Workers v. Pittsburgh Plate Glass*, supra, 404 U.S. at 167.[22] When undertaking this task, the Board has uniformly interpreted ''employee'' in the ''broad generic sense'' to ''include members of the working class generally.''[23] Under this expansive interpretation, the Board has found that Section 2(3) covers not only employees of a particular employer, but also employees of another employer, former employees of a particular employer, applicants for work, temporary and part-time employees, and individuals attending school or working a second job.[24]

In accord with its broad interpretation of Section 2(3), the Board historically has held that paid union organizers are ''employees'' entitled to the Act's protections. Thus, in *Dee Knitting Mills*, 214 NLRB 1041 (1974), enfd. mem. 538 F.2d 312 (2d Cir. 1975), the Board held that ''an employee does not lose his status because he is also paid to organize.'' Id. In *Oak Apparel*, supra, the Board adopted the administrative law judge's conclusion that:

> The definition in the Act provides that ''the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states other-

[20] See also *Kelley v. Southern Pacific Co*., 419 U.S. 318, 324 (1974); *Dellums v. Powell*, 566 F.2d 216, 222 fn. 22 (D.C. Cir. 1977), cert. denied 438 U.S. 916 (1978); *Beaver v. Jacuzzi Brothers, Inc*., 454 F.2d 284, 285 (8th Cir. 1972); *Mazer v. Lipshutz*, 360 F.2d 275, 278 (3d Cir.), cert. denied 385 U.S. 833 (1966).

[21] This position recently was endorsed by the District of Columbia Court of Appeals in *Willmar Electric Service v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992).

[22] See also *Sure-Tan, Inc. v. NLRB*, supra, 467 U.S. at 891: *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 304 (1977); *NLRB v. Hearst Publications*, 322 U.S. 111, 130 (1944); *Iron Workers v. Perko*, 373 U.S. 701, 706 (1963).

[23] *Briggs Mfg. Co*., 75 NLRB 569, 570 (1947); *Oak Apparel*, supra. See also *Consolidation Coal Co*., 266 NLRB 670, 674 (1983); *Giant Food Markets*, 241 NLRB 727, 728 fn. 3 (1979); *Little Rock Crate & Basket Co*., 227 NLRB 1406 (1977).

[24] *Briggs Mfg. Co*., supra, 75 NLRB at 570; *Little Rock Crate & Basket Co*., supra; *Oak Apparel*, supra, 218 NLRB at 707; *L. D. Brinkman Southeast*, 261 NLRB 204, 210 (1984).

> wise. . . .'' While the definition expressly excludes particular kinds of employees, [paid union organizers] would not fall into any of these excluded categories. In accord with the broad application given to this definition, the Board and the courts find generally that individuals who are hired by, work under the control of, and receive compensation from, an employer, are employees of that employer and entitled to the protection of the Act, including cases where they were employed on a part-time or temporary basis; were attending school; were working on a second job; or in other circumstances which indicated they intended to remain on a particular job for a limited time. [Footnote omitted.]

The Board in *Oak Apparel* rejected the argument that the discharged union organizers were not ''employees'' because they did not intend to remain in the respondent's employ beyond the period required for organization.[25] The Board found it immaterial for purposes of Section 8(a)(3) whether the discharged organizers sought permanent employment with the respondent. Permanency of employment, the Board held, was relevant for election purposes, but was unrelated to the issue of ''employee'' status. Id. at 701, citing *Phelps Dodge Corp. v. NLRB*, supra, 313 U.S. at 192; *Dee Knitting Mills, Inc.*, supra. To hold otherwise, concluded the Board, would result in employers discriminating ''with impunity against temporary or casual employees who are not includable in any bargaining unit.'' Id. Since *Oak Apparel*, the Board consistently has held that paid union organizers are statutory employees entitled to the Act's protection.[26]

c. *The courts of appeals*

The Second, Third, and District of Columbia Circuit Courts of Appeals agree with the Board that a paid union organizer can nonetheless be an ''employee'' under the Act. See *NLRB v. Henlopen Mfg. Co.*., 599 F.2d 26, 30 (2d Cir. 1979) (dictum);[27] *Escada (USA), Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992), enfg. mem. 304 NLRB 845 (1991); *Willmar Electric Service v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992). Two courts of appeals disagree with the Board. See *NLRB v. Elias Bros. Big Boy*, 327 F.2d 421, 427 (6th Cir. 1964); *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989).

5. Reexamination of our interpretation of Section 2(3)

Upon reexamination of our analysis of the scope of Section 2(3) in *Oak Apparel* and its progeny, we conclude that the definition of ''employee'' encompasses paid union organizers.

As more fully explained above, we rely on: (1) the language of Section 2(3) which, given its ordinary meaning and Congress' determination not to place paid union organizers among its other exclusions, must be read inclusively to encompass paid organizers; (2) the Supreme Court's consistently broad interpretation of Section 2(3) and its application of common law agency principles to find that an individual cannot be excluded from the definition of ''employee'' on the basis that he is being paid by two employers; and (3) the reasoning found in our own precedents, most recently approved by the District of Columbia Circuit in *Willmar Electric Service*, supra, that, among other things, rejects the position that because the employment of paid union organizers is of limited duration they cannot be ''employees.''

The Respondent and its amici rely on the Fourth Circuit's reasoning in *H. B. Zachry v. NLRB*, supra. The court held that it would distort the ''ordinary meaning'' of ''employee'' to include within the Section 2(3) definition someone who was employed and directed in his organizing efforts by the union and who would continue to receive wages and benefits from the union while he was also employed by the employer being organized (citing *Chemical Workers v. Pittsburgh Plate Glass*, supra, 404 U.S. at 167–168). *H. B. Zachry v. NLRB*, supra, 886 F.2d at 73.

The District of Columbia Circuit in *Willmar Electric Service v. NLRB*, supra, recently addressed this point. The court applied common law agency principles to interpret Section 2(3) to include concurrently employed paid union organizers.[28] Observing that a paid organizer's employment would give him a better perch from which to propagandize, the *Willmar* court nonetheless found that this was inadequate to distinguish the paid organizer from an unpaid union zealot, who was plainly an ''employee.'' We agree and conclude that union organizers are ''employees.''[29]

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[25] The Board also rejected the contention that the paid organizers in *Oak Apparel* were not employees because the union directed their organizational activities and controlled their employment through compensation.

[26] *Anthony Forest Products*, supra, 231 NLRB at 977–978; *Lyndale Mfg. Corp*., 238 NLRB 1281, 1283 fn. 3 (1978); *Margaret Anzalone, Inc*., 242 NLRB 879, 888 (1979); *Palby Lingerie, Inc*., 252 NLRB 176, 182 (1980); *Pilliod of Mississippi*, 275 NLRB 799, 811 (1985); *Multimatic Products*, 288 NLRB 1279, 1313, 1316 fn. 226 (1988).

[27] The Second Circuit refused to enforce the Board's Order on other grounds, however.

[28] The court cited *Nationwide Mutual Insurance Co. v. Darden*, supra, 112 S.Ct. at 1344, in support of its application of common-law agency principles. Id. at 1329.

[29] In our view, the Respondent's restrictive definition of ''employee'' to exclude those working for two employers at the same time draws little support from its citation to *Chemical Workers v. Pittsburgh Plate Glass*, supra. There the Supreme Court held that the statutory language must be given its ''ordinary meaning;'' nothing in that decision points to a conclusion that dual-employed individuals fall outside the ordinary meaning of ''employee.'' On the con-

C. *Policy Considerations*

We next consider whether protecting paid union organizers as ''employees'' furthers the policies of the National Labor Relations Act.

The right to organize is at the core of the purpose for which the statute was enacted.[30] No coherent policy considerations to the contrary have been advanced that do not, upon analysis, resolve themselves into arguments that employers be permitted to discriminate based on an individual's presumed or avowed intention to join or assist a labor organization.[31]

We find no conflict between protecting paid union organizers as employees and legitimate managerial rights:

> Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of the business enterprise. *Phelps Dodge Corp. v. NLRB*, supra, 313 U.S. at 182.

While working for the employer, the paid organizer is subject to its direction and control, and is responsible for performing assigned work. The organizer's activities, like those of any employee, may be limited pursuant to lawful no-solicitation rules. *Republic Aviation Corp. v. NLRB*, supra, 324 U.S. at 802–803 fn. 10. Outside worktime, however, the organizer—like other workers—is free to solicit for the union. Id. The fact that a paid organizer may approach his nonworktime organizing activities with greater vigor than an unpaid union adherent is not an acceptable basis for denying the organizer statutory protections.

The Respondent and its amici also contend that finding that an organizer is an ''employee'' within the ambit of Section 2(3) would impinge on the employees self-determination rights because the union organizer would be paid by the union to vote for it in an election.

The organizer's status as a statutory employee does not, however, ensure his right to vote.[32] In determining whether statutory ''employees'' are eligible to vote, the Board applies a traditional ''community of interest'' test. *Multimatic Products*, supra, 288 NLRB at 1316. Under this test, paid union organizers frequently are excluded from voting, either as ''temporary'' employees,[33] or because their interests sufficiently differ from those of their coworkers.[34] In short, employee status is not synonymous with voter eligibility. *Willmar*, supra, 986 F.2d at 1330. Accordingly, any concern over unions packing bargaining units with their paid functionaries is, in our experience and judgment, misplaced.

Next, the Respondent relies on the Fourth Circuit's determination that our approach does not sufficiently account for the adversary relationship between employer and union. The Circuit relied on the Supreme Court's decision in *NLRB v. Babcock & Wilcox*, supra, among other things, as support for this view.

Our determination that paid union organizers are ''employees'' is, however, completely consistent with the philosophy of *NLRB v. Babcock & Wilcox*., supra. *Babcock & Wilcox*, as recently reaffirmed by the Supreme Court in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), balances the property rights of employers against the Section 7 rights of employees to learn about self-organization from nonemployees. This balancing process, however, is inapplicable to Section 2(3) employees. Neither *Babcock & Wilcox* nor *Lechmere* interpret Section 2(3), or so much as hint that property rights may be resurrected as a device to bar activity long protected by the statute.[35] Instead,

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trary, the Supreme Court expansively interpreted ''employee'' in *Pittsburgh Plate Glass* to include anyone working for another for hire.

[30] *NLRB v. Hearst Publications*, supra, 322 U.S. at 126; *Phelps Dodge Corp. v. NLRB*, supra, 313 U.S. at 193 (''the central purpose of the Act [is] directed . . . toward the achievement and maintenance of workers' self-organization''); *Republic Aviation v. NLRB*, 324 U.S. 793, 797 (1945).

[31] Paid organizers are not employees *because* they fulfill the important function of providing coworkers with information on their rights to self-organization. Having concluded that paid organizers are employees, however, their employment furthers this fundamental policy of the Act.

[32] Note, *H. B. Zachry Co. v. NLRB: Paid Full-Time Union Organizer Not an ''Employee,''* 50 La. L. Rev. 1211, 1217 (1990). The Board is free to exclude statutory employees from bargaining units who are otherwise protected by the Act. *NLRB v. Action Automotive*, 469 U.S. 490, 498 (1985). See generally *NLRB v. Hendricks County Rural Electric Corp*., 454 U.S. 170, 190 (1981). As stated in *Oak Apparel*, supra, 218 NLRB at 701:

> The distinction between an employee's status with respect to the appropriate unit and his or her status as an ''employee'' within the meaning of Section 2(3) has been recognized since the infancy of the administration of the Act.

[33] Paid union organizers do not, however, forfeit their status as ''employees'' because they do not intend to retain their employment beyond the duration of an organizing campaign. Although the permanency of employment is relevant to the issue of voter eligibility, it is irrelevant to ''employee'' status. *Oak Apparel*, 218 NLRB at 701. It is well settled that temporary employees are within the ambit of Sec. 2(3) and are entitled to the Act's protections. See, e.g., *Pennsylvania Electric Co*., 289 NLRB 1200 (1988); *EDP Medical Computer Systems*, 284 NLRB 1232 (1987). To hold otherwise, and single out paid union organizers for exclusion from 2(3) coverage as ''temporaries'' flies in the face of Sec. 7 protections. Of course, employers may lawfully refuse to hire individuals seeking temporary employment, where the refusal is based on neutral hiring policies, uniformly applied. *Willmar Electric Service*, supra, 303 NLRB 245 fn. 2.

[34] *Oak Apparel*, supra, 218 NLRB at 701; *Dee Knitting Mills*, supra, 214 NLRB at 1041; *299 Lincoln Street, Inc*., 292 NLRB 172, 180 (1988).

[35] Amici argue that paid union organizers are not ''employees'' because their request for employment is a guise to gain access to the employer's private property to further the union's objective. Although gaining such access likely will facilitate the paid organizer's union activities, as long as the organizer is able, available, and fully

Continued

they address the lawful restrictions that employers can place on nonemployees. See, *Willmar*, at 1330.

The Respondent and its amici vigorously contend that paid union organizers will engage in union activities to the detriment of work assigned by the employer or will embark on acts inimical to the employer's legitimate interests. We do not agree. The statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's workforce if hired establishes neither their unwillingness nor their inability to perform quality services for the employer. Indeed, because the organizers seek access to the jobsite for organizational purposes, engaging in conduct warranting discharge would be antithetical to their objective. No body of evidence has been presented that would support any generalized, or specific, finding that paid union organizers as a class have a significant, or indeed any, tendency to engage in such conduct.

The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may appear to give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize. To hold otherwise at this late date would require ''some type of transcendent loyalty'' on the part of an ''employee'' to the employer that, in theory, even the Fourth Circuit would not require. *Zachary*, supra, 886 F.2d at 73.[36]

Our decisions finding that union organizers are not meaningfully distinguishable from other ''employees'' under the statute should not be read, however, to give paid union organizers carte blanche in the workplace. If the organizer violates valid work rules, or fails to perform adequately, the organizer lawfully may be subjected to the same nondiscriminatory discipline as any other employee. See *Wellington Mills Div. v. NLRB*, 330 F.2d 579 (4th Cir. 1964), cert. denied 379 U.S. 882; *Sears, Roebuck & Co.*, 170 NLRB 533 (1968). In the absence of objective evidence, however, we will not infer a disabling conflict or presume that, if hired, paid union organizers will engage in activities inimical to the employer's operations.[37] Thus, we find no policy reason to disregard present decisional law to find that since a union orgainzer serves the union as well as the company he is eliminated from the definition of employee under Section 2(3) of the Act.

Having carefully reviewed the language of Section 2(3), its legislative history, policy, and the wealth of decisional law interpreting this statutory provision, we reaffirm our adherence to *Oak Apparel* and its progeny. We conclude that full-time, paid union organizers are ''employees'' entitled to the Act's protections.

Here, paid union organizers William Creeden and Anthony Yakomowicz were qualified applicants and there is no evidence that they would have failed to perform assigned work properly if hired. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) and (3) by refusing to hire Creeden and Yakomowicz from the Union's batched applications.

D. *The Refusal to Hire Creedon*

We also agree with the judge that the Respondent did not additionally violate Section 8(a)(3) by refusing to hire Creeden, on April 21, during a strike. The judge observed that the strike was called by the Union ''to further a cause with which Creeden had been openly and continuously identified.'' The judge concluded that an employer should not be required during a strike to hire a paid organizer whose role ''is inherently and unmistakably inconsistent with employment behind a picket line.'' We agree.

In our experience, when a company is struck it is not ''business as usual.'' The union and employer are in an economic battle in which the union's legitimate

intends to work for the employer if hired, he will not be disqualified from ''employee'' status. Further, a paid union organizer employee arguably poses no greater threat to an employer's property rights than a pro-union employee who voluntarily engages in organizational activity. Note, *H. B. Zachry Co. v. NLRB: Paid Full-Time Union Organizer Not an ''Employee,''* 50 La. L. Rev. 1211, 1215–1216 (1990).

[36] Although employers lawfully may insist that employees adequately perform assigned work, they cannot insist that employees forego organizing activities, or treat those activities as ''disloyalty.'' *Texaco, Inc. v. NLRB*, 462 F.2d 812, 814 (3d Cir.), cert. denied 409 U.S. 1008 (1972); *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980). Employees have the fundamental right to urge their coworkers to support the union on company property, outside working hours. *Republic Aviation v. NLRB*, supra.

[37] We find no merit in the Respondent's contention that because an employer's payment of wages to the organizer partially offsets the union's obligation to pay him, this payment may violate Sec. 8(a)(2)'s proscription against employers contributing financial support to unions. Organizer employees are paid by the employer for work performed for the employer, not for the union. We also note that Sec. 302 of the Labor Management Relations Act specifically contemplates that paid union personnel can be ''employees'' of other employers. Thus, although Sec. 302 generally prohibits employers from paying union employees, it expressly exempts payments by employers ''to any . . . employee of a labor organization, who is also an employee . . . of such employer, as compensation for, or by reason of, his service as an employee of such employer. 29 U.S.C. § 186(c)(1) (1988).

The Chamber of Commerce asserted at oral argument that paid organizers are not Sec. 2(3) employees because they work for labor organizations which are not ''employers'' under Sec. 2(2). We reject this argument. Although Sec. 2(3) expressly excludes individuals who work for persons who are not statutory ''employers,'' labor organizations are Sec. 2(2) ''employers'' of their own employees. Further, it is immaterial for purposes of our analysis whether unions are statutory employers; the organizer derives his ''employee'' status from his employment, or attempted employment, with the Respondent. Thus, for example, an agricultural employee (who is excluded under Sec. 2(3)), or a Federal Government employee (who works for an entity outside Sec. 2(2)), would nonetheless be a Sec. 2(3) employee if he sought dual employment with a statutory employer.

objective is to shut down the employer in order to force it to accede to the union's demands. The employer's equally legitimate goal is usually to resist by continuing production, often with nonunit employees, nonstrikers, and replacements. Thus, an employer faced with a strike can take steps aimed at protecting itself from economic injury. For example, an employer can permanently replace the strikers,[38] it can lock out the unit employees[39] and it can hire temporary replacements for the locked-out employees.[40] Consistent with these principles, we believe that the employer can refuse to hire, during the dispute, an agent of the striking union.

We reach the same result analyzing this under the test of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (1967). The Respondent plainly engaged in discriminatory conduct in refusing to hire Creeden because of his status as a paid organizer of the Union. Because the refusal to hire occurred during a period when the Union was engaged in a strike against the Respondent, however—i.e. a period during which the Union was seeking to induce employees to *withhold* services from the Respondent—it would seem at most a ''comparatively slight'' harm to ''employee rights'' to allow the Respondent to decline to bring a paid agent of the Union into the workforce that is *providing* services. Id. at 34. Cf. *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 230, 231 (1963) (grant of superseniority to strike replacements and crossovers properly deemed a severe and continuing burden on the right to strike even after the strike has ended). Furthermore, given the conflict between an employer's interest, as discussed above, in operating during a strike and a striking union's evident interest in persuading employees *not* to help it operate, we find that the Respondent has a ''substantial and legitimate'' business justification for declining to hire a paid agent of the Union for the duration of the strike. *NLRB v. Great Dane Trailers*, supra, 388 U.S. at 34.[41]

Creeden's interest and objectives in this strike situation as the union's agent were aligned with the Union—on whose behest he acted. He was hardly a typical strike replacement. We find in this particular circumstance that it does not vitiate the core policies of the Act to allow an employer this limited safety valve. We conclude, therefore, like the judge, that the Respondent did not violate Section 8(a)(3) by refusing to hire Creeden as a strike replacement.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sunland Construction Co., Inc., St. Francisville, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, concurring.

In *Escada (USA), Inc*., 304 NLRB 845 (1991), enfd. mem. 970 F.2d 898 (3d Cir. 1992), I dissented from the Board's finding that a paid union organizer was an ''employee'' within the meaning of Section 2(3) of the Act. I relied on the Fourth Circuit's reasoning in *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989). I nonetheless remained concerned about the correctness of my position on what I consider to be a very close and troubling policy and legal question. I thus welcomed the oral argument and full briefing of the issues presented in this case by the parties and amici. The proceedings in this case as well as the District of Columbia Circuit's recent, thoughtful opinion in *Willmar Electric Service v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), have caused me to reassess my position in *Escada*. Upon further consideration, I have decided to join the majority and, for the reasons stated in the main opinion, to find that paid union organizer applicants are ''employees'' entitled to the Act's protections.

The issue in this case is perhaps more difficult for me than any I have addressed in my tenure at the Board, following a lifetime of service in the private sector. Much as we would hope to have it otherwise, the relationship between a nonunion employer and a

[38] *NLRB v. Mackay Radio & Telegraph*, supra, 304 U.S. at 345–346.

[39] *American Ship Builders v. NLRB*, 380 U.S. 300 (1965).

[40] *Harter Equipment Co*., 280 NLRB 597 (1986).

[41] It is in the matter of conflicting interests that this issue differs from the issue of whether an employer can refuse, when there is no strike, to hire an applicant simply because of his of her status as a paid union organizer. As explained above, given the statutory protection for forming and joining unions, it cannot properly be said that there is any inherent conflict between carrying out the duties of an employee and operating as a paid union organizer. The aim of inducing fellow employees to join a union is entirely consistent with being a competent employee who obeys work rules such as those time-and-place restrictions on union solicitation that are lawful under *Republic Aviation Corp. v. NLRB*, supra, and its progeny. Thus, although we would not permit an employer to presume generally that paid organizers will be disloyal employees, we see no problem with a presumption that someone who is being paid by the organization that is seeking to induce employees to withhold services would not be inclined wholeheartedly to provide services for the duration of the organization's effort.

Employees who are not on a striking union's payroll are another matter. They may well still support the union as a bargaining representative even though they have abandoned the strike and returned to work. See *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 781 (1990). But because they are not obligated to the union as paid agents, it cannot necessarily be presumed that they will be seeking to further the union's object of depriving the employer of employee services during the strike. Thus, in finding that the Respondent could decline to hire Creeden during the strike, we do not suggest that employers have carte blanche to refuse to permit prounion employees to return to work during a strike or to hire them as strike replacements.

union seeking to organize its employees is usually adversarial, and sometimes quite heated. The employers in these cases, and probably most nonunion employers, do not view the paid union organizer applicant as just another prospective employee who, in harmony with the employer's interests, promises a good day's work for a day's pay. To many nonunion employers bent upon keeping their operations nonunion, the paid union organizer comes with an antithetical goal—to organize the employees—and his presence in the workplace is reminiscent of the Trojan Horse whose innocuous appearance shields a deadly enemy.[1]

Being aware of the ''facts of life'' in the workplace does not, however, end my inquiry. In fact, it only begins it, for I must above all ascertain whether, despite the significant disadvantages to the nonunion employer of having to hire a paid union organizer, Congress nonetheless intended to extend the Act's protections to such individuals. I conclude that it did.

Underlying the Act is the Congressional goal of ''facilitating the organization and recognition of unions . . . .'' *American Hospital Assn. v. NLRB*, 111 S.Ct. 1539, 1543 (1991). Not surprisingly, therefore, as explained in the main opinion, the legislative materials and the Supreme Court decisions interpreting them reveal no purpose to exclude paid union organizer applicants from the ambit of Section 2(3) or otherwise to deny them the Act's protections. Board precedent is in accord with that analysis.

I have considered the possibility that the law permits me sufficient flexibility to apply to this case my own view of what should be wise national labor policy which, upon reflection, was what underlay my dissent in *Escada*. I do not now believe that I have that flexibility. A Board Member arguably has the authority to go behind the statutory language and legislative history to consider as well ''the deep-rooted policies of the statute.''[2] In my view, however, when a Board Member, who must act in a quasi-judicial capacity, makes a policy judgment hinged on what that Member thinks is wise national labor policy, there must be some objective basis in the statutory language or legislative history for inferring that his policy judgment is consonant with Congressional objectives. He cannot rely solely on his own preferences or on what he thinks should be national labor policy. In my opinion, the legislative materials and Supreme Court decisions interpreting those materials simply do not provide support for a policy judgment to exclude union organizers from the definition of ''employee.'' It is thus my view that I lack authority to exclude paid union organizers from the definition of ''employee'' in Section 2(3) on policy grounds. And I find it abundantly clear, as explained in the main opinion, that paid union organizers are ''employees'' within the ordinary meaning of that word. Accordingly, I believe that if paid union organizers are now to be excluded, Congress must say so explicitly.

[1] While the nonunion employer's workplace philosophy—and management's relationship with its employees—generally depends on its keeping exclusive control of the terms and conditions of employment, as I discuss below the case for advancing that philosophy by excluding paid union organizer applicants is not sufficiently strong to override the plain intent of Congress to accord such organizers the Act's protections. As the main opinion explains, however, the situation is different where the paid union organizer applies for work during a strike. There, the special circumstances of an economic strike justify a refusal to hire. Accordingly, I agree that the Respondent here did not violate Sec. 8(a)(3) when it refused to hire paid union organizer Creeden during a strike.

[2] See, Summers, *Politics, Policy Making, and the NLRB*, 6 Syracuse L. Rev. 93, 105 (1954–1955); Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. Pa. L. Rev. 254 (1968).

MEMBER RAUDABAUGH, concurring.

With respect to the refusal to hire Creeden, I agree with my colleagues as to the result and rationale. With respect to the other portions of the majority decision, I concur as to the result but I have a separate rationale. In my judgment, the decision does not foreclose an employer from protecting itself against the union stratagem involved herein.

Without necessarily endorsing the entire rationale, I agree with my colleagues that paid union organizers are employees within the meaning of Section 2(3) of the Act.[1] However, it does not necessarily follow that the employer's refusal to hire a paid union organizer is unlawful under Section 8(a)(3). In order to establish a violation of that section, it must be established that the employer's action was unlawfully motivated. The principles concerning unlawful motivation are set forth in *Wright Line*, 251 NLRB 1083 (1980).

Applying these principles, if an employer has a nondiscriminatory policy or practice of refusing to hire temporary employees, I think it clear that the employer, acting pursuant to that policy or practice, could refuse to hire someone who plans to work for the employer during an organizational drive and to leave thereafter.[2] Further, even if the employer does not learn of these plans until after the employee has been hired, the employer, acting pursuant to its policy or practice, could lawfully discharge the employee. For, under *Wright Line*, the employer would not have hired

[1] The term ''paid union organizer'' clearly embraces persons who are paid a salary by the union in return for the service of organizing the employees at the workplace where they will be employed. In my view, the term also embraces those persons to whom the union will pay travel expenses and the difference between their earnings at the workplace and ''union scale'' in the geographic area. These persons, like those in the former group, receive union compensation and they are expected to assist and participate in the organizational drive.

[2] Pursuant to that policy or practice, I believe that the employer can ask the applicant if he/she intends to be a permanent employee.

the employee in the first place if it had known of the employee's plans.

A similar result would be obtained if the employer has a nondiscriminatory policy or practice of refusing to hire persons who (a) will be simultaneously employed by another employer, *or* (b) will have ''moonlight'' employment, *or* (c) will be employed by companies or other institutions which are adversaries of the employer.[3] If an employer has such a policy or practice, I believe that the employer, acting pursuant thereto, could lawfully refuse to hire a paid union organizer. For, in most situations, the employment would be contrary to (a) or (c) above.[4] Further, even if the employer does not learn of the other employment until after the person has been hired, the employer, acting pursuant to its policy or practice, could lawfully discharge the person. See *Wright Line*, supra.

The policies and practices discussed above are not aimed at the applicant-employee who is only a zealous union supporter. I agree that the employer cannot refuse to hire, and cannot discharge, an individual merely because he/she intends to organize the employees of the employer.

The policies and practices discussed above are valid under a *Great Dane* analysis.[5] There is only a slight impact on the Section 7 rights of the employer's employees. They are free to organize, and they can engage in organizational activities on the premises of the employer. Moreover, they are free to meet with union organizers after working hours when the employees have departed the employer's premises. In short, the employees have their full Section 7 rights. What they do not have is what Section 7 does not guarantee, viz., a union organizer who is on the premises during working time.

In addition, under the *Great Dane* analysis, the employer has a legitimate and substantial interest in applying its nondiscriminatory policy or practice to paid union organizers. Under *Babcock & Wilcox*[6] and *Lechmere*,[7] an employer has a right to keep paid union organizers off the property of the employer, except in rare circumstances. Absent the policy or practice described above, the paid union organizers would have easy access to the employer's property. Instead of using reasonable nontrespassory alternatives, the paid union organizer could simply come in through the front door as an applicant. Assuming that the union organizer is qualified to do the employer's work, the employer would be obligated to hire him/her.

I do not believe that the Supreme Court, having erected the property barriers in *Babcock* and *Lechmere*, intended for these barriers to be so easily transgressed. Accordingly, assuming that the employer has the aforementioned policy or practice, I believe that the employer, acting pursuant to that policy or practice, cannot be forced to hire, and can discharge, the paid union organizer.[8]

J. A. Dotson, Esq., for the General Counsel.
Frederic Gover, Esq. (Canterbury, Stuber, Elder & Gooch), of Dallas, Texas, for the Respondent.
Michael T. Manley, Esq. (Blake & Uhlis), of Kansas City, Kansas, for the Charging Party.

[3] The term ''simultaneous'' employment, as used herein, refers to an employee who is employed during the same hours by two employers. The term ''moonlighting,'' as used herein, refers to an employee who is employed by one employer for certain hours and by another employer during subsequent hours.

[4] Pursuant to that policy or practice, an employer could lawfully ask applicants to list other entities who will be employing them if they work for the employer.

[5] *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[6] *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

[7] *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992).

[8] Since the Respondent herein did not establish such a policy or practice, I concur in the result reached by my colleagues.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This proceeding was tried in St. Francisville, Louisiana, on January 30 and 31 and February 1 and 2, 1989, upon an initial unfair labor practice charge filed on June 17, 1988, and a consolidated complaint issued on August 31, 1988, alleging that the Respondent violated Section 8(a)(1) of the Act by discriminatorally promulgating a no-solicitation rule, and by a variety of coercive actions, including interrogation and threats. The complaint further alleged that Respondent violated Section 8(a)(3) and (1) by refusing to hire, discharging, sending home, reprimanding, and imposing more onerous working conditions upon employees in reprisal for union activity. Finally, the complaint alleged that a strike which commenced on April 19, 1988, was caused or prolonged by the aforesaid unfair labor practices, and that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate the strikers immediately upon their unconditional offer to return to work. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. After close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

Upon the entire record in this proceeding,[1] including my opportunity to observe the witnesses while testifying and their demeanor,[2] and after consideration of the posthearing briefs, it is hereby found as follows:

I. JURISDICTION

The Respondent is a Delaware corporation engaged as mechanical contractor from its headquarters in Houston, Texas, and a jobsite in St. Francisville, Louisiana, the sole location

[1] Errors in the transcript have been noted and corrected.

[2] Credibility resolutions hereinafter made occasionally are accompanied by objective rationale. This is intended to reenforce, not discount, my impressions gained from first-hand observation of the witnesses. Needless to say, unmentioned testimony is rejected to the extent that it is irreconcilable with expressly credited testimony.

involved in this proceeding. In the course of said operations, the Respondent, during the 12-month period preceding issuance of the complaint, a representative period, performed services valued in excess of $50,000, in States other than Louisiana, and received at said jobsite, goods, products, and materials valued in excess of $50,000 directly from points outside the State of Louisiana.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers Helpers, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

The Respondent is one of several construction contractors based along the southern tier of the United States that competitively bid periodic heavy maintenance jobs in mills, refineries, and industrial plants. These contractors often refer to themselves as ''merit shops.'' They operate without any form of union affiliation.

The jobs involved are labor intense. Yet, merit shop contractors, as a general rule, must prepare prebid estimates without benefit of a fixed work force. Once a job is awarded, the process of obtaining the requisite skills and supervision begins in earnest. However, as in the Respondent's case, these contractors often move from one labor market to another. Although it is essential to hire craftsmen possessed of traditional building trades skills, the merit shop contractors do not solicit or in any fashion utilize union hiring halls. Instead, they attempt to draw workmen from independent sources.

Historically, affiliated unions in this industry were in a position to contain, if not prevent, incursions by nonunion contractors. Through their hiring halls and membership restrictions, these unions controlled the available journeymen, most of whom acquired their skills and craft status through apprenticeships which they sponsored and supported. Recently, however, depressed economic conditions and unemployment in this industry have weakened that control, while allowing nonunion operators to man projects on the basis of innovative employment strategies, including ''double-breasting.'' In consequence, traditional union restraints upon employer access to skilled building trades labor has lost some of its punch as a means of preserving union standards and employment opportunities for the membership.

Apparently, to reverse that trend, the Charging Party developed a so called ''Strike-Back'' strategy, targeting several nonunion employers, including the Respondent. This case evolves from the Union's unique campaign at the Respondent's project at the James River Paper Mill in St. Francisville, Louisiana. The Respondent was the contractor assigned to perform a complete overhaul of a recovery boiler which is generally considered the heart of the process by which paper is produced. Two contracts were involved, but the entire job had an expected duration of only about 6 months.[3] It would be manned by skilled and unskilled labor. The price for the job was fixed, without relief for increased labor costs.

The project required welders, pipefitters, and boilermakers—crafts corresponding to those represented by the Union's Local 582, domiciled in Baton Rouge, Louisiana. Obviously, the latter was not sought out by the Respondent as among its employment sources. The ensuing labor dispute unveiled a strategy somewhat atypical of what one might expect in the construction industry, where often there is no fixed work force and, absent employer assent, a bargaining relationship based on majority support, is seldom enforceable after completion of a project. Yet, in this instance, the Union's effort did not begin until the project, which was completed in May, had merely 3 months to go. The campaign employed a ''Trojan Horse'' strategy. At the vanguard were four longtime members of Local 582: Thomas Lindsey, Willie Covington, Kenny Davis, and David Felter. Lindsey was the Local's vice president. All four applied, and were hired by the Respondent to work on this project. Upon hire, the Union gave them special dispensation,[4] through documents which recited that their purpose in obtaining such employment was to organize the job.[5]

The Respondent was first alerted to the Union's scheme on March 8, 1988.[6] On that date, all four wore organizational buttons, and A. B. Williford, the Respondent's project superintendent, was notified orally and in writing that an attempt was under way to organize the job.

In the meantime, the Union had obtained or copied the Respondent's standard job application. At the union hall, members were encouraged to complete applications. On March 9, Lindsey and Covington personally delivered a number of completed applications to Williford.[7] On March 17, Davis and Covington gave Williford another series of applications,[8] This was followed by Lindsey's submission of additional applications on March 25. Finally, on April 6, nonemployee, professional union organizers Bill Creeden and Anthony Yakomowicz visited the jobsite to file additional applications, including their own.[9] The Respondent subsequently

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[3] Recovery boiler outages in paper mill plants were the Respondent's specialty. These are short-term, but time-critical projects. In their performance an outage will occur which involves a boiler shutdown. During the outage, loss of the boiler will impede the customer's normal operations. Therefore, its length is restricted tightly by the project agreement. At St. Francisville, the scheduled outage of 56 days was not typical, but among the more lengthy.

[4] Art. XVII, par. 2, of the Charging Party's constitution states, in material part:

> No member shall accept employment with a nonunion contractor without prior written approval by the business manager . . . .

This restriction tends to facilitate important institutional objectives of the Union by denying contractors who are not signatory to an appropriate collective-bargaining agreement access to craftsmen who are union trained and union affiliated.

[5] See C.P. Exhs. 3(a) through (d).

[6] Unless otherwise indicated, all dates refer to 1988.

[7] See G.C. Exhs. 5(a)–(mm). The complaint identified 39 individuals as included within this submission.

[8] G.C. Exhs. 11(a) through (aa).

[9] These applications were delivered to the organizers by Assistant Business Agent John Kelly. They were received in evidence solely for the purpose of establishing their delivery to the Respondent on the date indicated.

hired boilermakers and welders, but none from the Union's batched applications.

The complaint alleges that the Respondent answered the organization campaign by a variety of independent 8(a)(1) violations, and retaliated against the four employee organizers by unlawfully reprimanding Willie Covington for engaging in union solicitation during working time, by discharging Felter, by disparately sending all four organizers home in the course of a rainy day, and later, by singling them out for onerous work. It is also alleged that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire from the applications forwarded through the Union.

Finally, it appears that on April 19, some 27 employees who supported the Union engaged in a strike. On April 26, the strike ended, with the Respondent notified expressly that this group had unconditionally offered to return to work.[10] It is undisputed that, in the days that followed, no striker was reinstated, although certain replacements hired in the interim were retained, while hiring continued after the strike's end.[11]

B. *Interference, Restraint, and Coercion*

1. The events of March 8

The Respondent was first alerted to organizational activity just prior to the 7 a.m. shift on March 8. That morning Lindsey, Covington, Felter, and Davis appeared at the jobsite wearing buttons identifying each as a member of a union organizing committee. They first sought out Project Superintendent Williford, leaving a message that they wished to see him upon his arrival.

Before Williford's arrival, Kenny Davis ran into Joe Molton, the Respondent's night-shift superintendent. The complaint addresses several coercive remarks allegedly made by Molton during that confrontation.

Thus, Davis testified that, while in route to pick up his tools, Molton stopped him, asking what he was doing wearing an organizing committee button. When Davis simply signified that he was wearing it, Molton allegedly responded,'' [you] are not organizing shit.'' Davis then asked Molton what he meant, whereupon Molton replied ''If you don' t get your tools and go to work, you don't have a job.''

Molton confirms the conversation, but offers a somewhat different version. Thus, he relates that at about 7 a.m., he was informed by a tube welder (Ron Shaw) that one of the men was wearing a union button and ''stirring up the men,'' stating further that if something were not done about it some men might quit. Molton went to investigate and observed that Kenny Davis was wearing a union button. Molton, apparently referring to the button, asked Davis what he had. Davis replied, ''Well, it is like it says . . . I am a Boilermaker Union Organizer.'' Molton accused Davis of stirring up the men, telling him that they were going to quit, and then asked, ''What is going on?'' Davis said that they were going to organize the job. Molton then replied, ''[W]ell you know as well as I do when you signed on that this is not a union job.'' Davis indicated that the organization attempt would be made and as he started to walk off towards his work area, Molton stated, ''well, you are not going to organize on company time.''

In this respect, the complaint alleges that the Respondent violated Section 8(a)(1) through Molton's coercive interrogation, and his instruction that Davis refrain from union activity, backed by a threat of discharge. I believed Davis in this instance. Aspects of Molton's account struck as less plausible . In any event, although the instant allegations are substantiated by Davis' credited account, illegalities exist on the face of Molton's testimony. Molton's admitted reminder to Davis as to the nonunion nature of the job plainly conveyed that unionization was incompatible with employment on Sunland's job. Such a remark by a high ranking management representative tended to impede the exercise of Section 7 of rights, and itself was unlawful. Moreover, the continued probing of Davis after suggesting that it was his obligation to accept the nonunion status of the job, was coercive even though Davis was an open and avowed union supporter. For these reasons, it is concluded that the 8(a)(1) allegations in question have been substantiated.

Additional 8(a)(1) conduct emerged after Williford's arrival. Having received Lindsey's message, Williford, in company with Molton, Joe Conners, and Ray Hollis, sought out the organizers. All four were present when Lindsey introduced himself as the vice president of Local 582 advising that they were going to organize the job. A letter to this effect was presented to Williford. (See G.C. Exh. 4.) Lindsey went on to state that in exercising their organizational rights, the men would perform their duties in productive fashion and would not sabotage the job.

During this conversation, Respondent's vice president, Joe Conners apparently lost control, shouting and cursing that the men should be fired forthwith. Williford sought to bring Conners under control, grabbing him by the arm, carrying him down the road.[12] The sole conflict as to this encounter relates to the Respondent's claim that Williford corrected Conners within earshot of the organizers. Even if this were so,[13] Williford's statement that the men had a right to organize, together with his nonverbal disapproval of Conners' outburst, and Conners' subsequent removal from the job, would not suffice to neutralize the latter's unmistakable threats. The severity of his remarks were sufficiently blatant to require, at a minimum, a direct, unmistakable disavowal, together with an affirmative assurance that no employee would be removed from the job because of union activity. However, Williford's actions included no express assurance that there would be no further intrusion upon Section 7 rights. In fact, this incident was followed by additional unlawful conduct, some of which reflected a predilection towards discrimination. In these circumstances, the Respondent has failed to erase the effects of Conners' threats. See e.g. *Dennett Road Manor*, 295 NLRB 397 (1989); *Taylor Chair Co.*, 292 NLRB 658 (1989); *Passavant Memorial Hospital*,

[10] See G.C. Exh. 9.

[11] Should it be determined that the strike was caused or prolonged by unfair labor practices, the identity of those whose jobs at that time and thereafter remained available, but filled by replacements, would be subject to determination as a compliance issue.

[12] About a week later, Conners was replaced and transferred to another Sunland job.

[13] Willie Covington's prehearing affidavit avers that after Conners' threatening comments, Williford said ''No,'' as he grabbed Conners by the arm to carry him down the road. In his testimony, Covington states that he is not sure that his affidavit is accurate in this respect.

237 NLRB 138 (1978). Accordingly, it is concluded that the Respondent thereby violated Section 8(a)(1) of the Act.

The complaint, based on this encounter, attributes several unfair labor practices to Williford. Thus, it alleges that Williford unlawfully ''informed . . . employees that it would be futile for them to select the Union as their representative by stating that Respondent would not negotiate with the Union.'' The specifics of the complaint are substantiated directly only by Davis and Felter. The testimony of Lindsey and Covington does not evidence that Williford specifically mentioned bargaining. Instead, Lindsey testified, with confirmation by Covington, that in the course of his exchange with Williford, the latter said that ''this job is not union and never will be union.''[14] However, Kenny Davis, while relating that Williford made a somewhat similar remark, offered a version which more closely tracks the complaint. Thus, according to his account:

> Tommy [Lindsey] introduced himself [sic] as the vice president of Local 582 and told him we wished to negotiate a contract with him. Bucky [Williford] read the letter of intent and told us he would not negotiate a contract with us.

Felter agreed that it was only after Lindsey informed Williford that he was there to negotiate a contract that Williford stated ''I will not negotiate.'' Considering the timing of the organizational effort in relation to the scheduled completion of the job, it is entirely possible that a demand for negotiations was made and that Williford's refusal was uttered in that context. Certainly no illegality would attach to his refusal of an outright request for bargaining. Accordingly, this allegation shall be dismissed.

The complaint also alleges that the Respondent, in the course of that confrontation, violated Section 8(a)(1) by Williford's instruction that'' employees not . . . engage in union activities or union solicitation during working hours.[15] Lindsey testified that in the course thereof, Williford told the organizers to confine their union activity to periods ''before work, at dinner and after work.'' Williford confirms that he told Lindsey that union activity was permissible'' as long as you keep this to your time before work, at lunch—nonworking hours—that it was not permitted to be done during working hours.'' The record does not disclose that employees enjoyed breaks other than for lunch, and hence under either version of Williford's remarks, no overly broad restriction was placed upon employee rights to engage in union solicitation. The 8(a)(1) allegation in this respect shall be dismissed.

[14] This statement is considered alien to the inquiry under the instant allegation. Here, the theory of the complaint is explicitly tied to Williford's remark that he would not negotiate. If the General Counsel had intended a broader theory, the allegation would have incorporated cause and effect language similar to that incorporated in par. 8(f)(i) where such a remark was attributed to David Williford, another supervisor and the brother of A. B. Williford. In any event, in light of my findings regarding David Williford, the issue will not affect the remedy and is plainly cumulative.

[15] Posted and orally promulgated restrictions on worktime solicitations, also by Williford, but on March 14, are the subject of additional allegations which are discussed below.

2. By Tommy Smith

On March 9, Lindsey and Covington delivered the first stack of applications to Williford. According to Lindsey, they then went to the fabrication shop because it was raining. While there, Lindsey was approached by Tommy Smith, the quality control inspector and an admitted supervisor. Smith first asked what the men were doing and was told that they were waiting for instructions as to whether they would work in the rain. Smith allegedly indicated ''Oh, you all are fixing to fab some brackets.'' Lindsey said Okay, whereupon Smith allegedly said, ''Bucky [Williford] was hot, mad yesterday . . . . He threw them applications in the garbage can.'' Lindsey asked why, and Smith allegedly explained, ''he would never hire you nor the other three organizers again, nor was he going to hire any other applicants that you turn in . . . because they was union.'' Lindsey claims that he interjected that he did not see why they would not be hired because they are all good workers, Smith replied, ''Yes, but you all are trying to organize this job.''

Smith recalled the conversation, but avers that Lindsey called him over, inquiring as to whether Williford was hot the day before. Smith replied, ''yes, you know he is hot.'' Smith could not recall telling Lindsey that the applications were thrown in the trash, but relates that he told Lindsey that the Company does not hire from applications, but they have their own list. He could not recall telling Lindsey that the organizers would not be hired again.

While I have strong reservations concerning Lindsey's credulity,[16] and only reluctantly accept his uncorroborated testimony, Smith appeared to labor under a hazy recollection. His use of terminology ''I don't remember ever saying that'' not only failed to constitute a denial, but was invoked in connection with remarks which, if made, would doubtless be within recall. Furthermore, his assertion that Lindsey was simply told that the Company does not hire from applications does not square with the fact that the Company does so, and continued, albeit on a limited basis, to do so on this very job.

Based on the credited testimony of Lindsey, the Respondent violated Section 8(a)(1) of the Act through Smith's statements that Williford had declared that the four organizers would not be hired on future jobs, and that Williford would not hire from the job applications submitted through the Union that very day because filed in furtherance of union organization.[17]

[16] Three of the General Counsel's own witnesses—Mark Castleberry [G.C. Exh. 5(hh)], Ferrill Alford [G.C. Exh. 5(ii)], and L.J. Garza [G.C. Exh. 5(cc)]—testified that they personally delivered their applications to the Respondent and that the Union had nothing to do with their respective filings. Lindsey swore that these applications were among those he delivered to Williford on March 9. My disbelief of Lindsey in this respect contributed to my reservations as to his credulity.

[17] The complaint in this case includes multiple allegations of independent 8(a)(1) violations. Moreover, the record is replete with testimony attempting to resurrect confrontations between employees and management. Some of these conversations relate to the above allegations, some do not. Among these allegations, however, is an assertion that in early April, Tommy Smith unlawfully interrogated an employee. This incident is not specifically addressed in the General Counsel's posthearing brief. The Respondent, however, states that it ''cannot recall'' that any such testimony was introduced. Having examined and reexamined the record, I find myself fully in agreement

3. By David Williford

David Williford is the brother of A. B. Williford. He served as the rigging supervisor on the night shift. The complaint alleged that the Respondent violated Section 8(a)(1) through his statements that the Company would never be Union, and by his threat that the wearing of union insignia would lead to discharge. Steve Grey, a boilermaker welder, was offered to substantiate these allegations. He related that on April 1, he asked the former if the job would go union, whereupon David Williford responded, ''Hell, no, this company will never be union.'' At this point, Grey allegedly stated that he was thinking about putting on a union button. David Williford warned, ''Steve, I advise you not to put one on because if you do, you will never work for us again.''

David Williford's denial proceeds along the line that he would not have threatened Grey concerning union buttons or stickers because he was instructed to refrain from such activity at a meeting conducted by the Respondent's attorney on March 11. However, he admitted that, if Grey asked his opinion on union matters, he would have obliged him. Although David Williford admitted that he held to the view that Sunland could not operate as a union contractor, he denied repeating this to any employees.

As between the two, I preferred Grey. Based on his credited account, it is concluded that the Respondent violated Section 8(a)(1) through his unlawful threat of discharge. Having made this remark, one might reasonably conclude that Williford's earlier statement that the Company will never be union would enforce this objective through proscribed means, and hence it too violated Section 8(a)(1). See, e.g., *Kessel Food Markets*, 287 NLRB 426 (1987).

4. Solicitation of nonunion craftsmen

The complaint alleged that the Respondent violated Section 8(a)(1) of the Act when Ron Jordan and William Gerald Bayless requested employees to provide names of nonunion applicants.

First, Willie Covington testified that while riding an elevator with all members of his crew on April 3, that he overheard Jordan, an admitted supervisor, tell employee Wayne Ellis that the Company needed welders, while asking if he knew of any nonunion elders. Jordan was not called. Although Covington's hearing may not have been the best, I am inclined to believe his uncontested testimony.

Steve Grey testified that Bayless, his foreman, on or about April 5, asked whether Grey knew any nonunion tube welders.[18] Grey claims to have asked why they had to be nonunion, and was told, ''Because they are scared if they hire anybody local, that they would be union, and they had to [sic] many problems already.'' Bayless denied having had any such conversation with Grey. He does suggest that when he learned that Grey decided to go home, rather than cross the picket line in mid-April, he told Grey that if Grey had any friends that needed jobs he could turn them in and maybe they would be hired. Bayless did not impress me as entirely forthright and Grey's testimony seemed entirely consistent with probabilities and the more credible.

Based on the credited testimony of Covington and Grey, it is concluded that the Respondent, through intimations that vacancies would be filled solely by nonunion employees, violated Section 8(a)(1) of the Act.[19]

5. The no-solicitation rule

The complaint alleges that since March 14, the Respondent violated Section 8(a)(1) by Williford's promulgation, by verbal announcement and posting, a discriminatory rule prohibiting solicitation during worktime.

The General Counsel offers no evidence to refute the Respondent's credible proof that a ban on worktime solicitation was maintained and in force at St. Francisville since January. Based thereon, it is concluded that, before March 8, the following was posted on a bulletin board in the time shack at this jobsite:

> ''NO SOLICITATION RULE''
>
> ''SOLICITATIONS (BY SCCI EMPLOYEES OR BY OTHERS TOWARD SCCI EMPLOYEES) SHALL BE PERMITTED ONLY IN NON-WORK AREAS, DURING THE EMPLOYEES' NON-WORKING TIME AS DEFINED AS BEFORE AND AFTER REGULAR WORKING HOURS, LUNCH BREAK AND REST PERIODS.''
>
> A REVIEW OF NLRB DECISIONS IN THIS AREA STATE THAT IT IS NOT AN UNFAIR LABOR PRACTICE TO BAR EMPLOYEES FROM DISTRIBUTING UNION LITERATURE OR FROM SOLICITING MEMBERSHIP IN OR AID FOR LABOR ORGANIZATIONS DURING EMPLOYEES' WORKING TIME AND IN AREAS WHERE THE WORK IS TO BE PERFORMED. THE RATIONALE IS THAT SOLICITATION MAY BE RESTRICTED SO AS NOT TO REDUCE THE EFFICIENCY OF LABOR.
>
> THE RULE SHOULD BE ADMINISTERED IN A FAIR MANNER SO AS NOT TO DISCRIMINATE AGAINST SOLICITATION FOR UNION MEMBERSHIPS. THEREFORE, ALSO RESTRICT SOCIAL AND CHARITABLE SOLICITATIONS TO THE TIMES AND PLACES STATED IN THE RULE.[20]

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with the Respondent's observation. Perhaps it is the ''rub'' of the process, but it is hoped that over the years the General Counsel and Regional Directors have given some thought to the development of procedures which would spare the need for opposing counsel and the administrative law judge to engage in time consuming ventures through a lengthy record because trial counsel has neglected to withdraw an unsubstantiated allegation.

[18] The complaint and witness Grey attributed this incident to a supervisor named Gerald Williams. During the hearing, all parties were apprised that this was an inadvertent reference and that William Gerald Bayless, an admitted supervisor was the focus of this allegation. The complaint has been amended to correct the erroneous reference.

[19] Charles Bowman implicated Foreman Jimmie Broadwater in a similar expression of preference during a mid-March conversation. The complaint omits reference to any such incident.

[20] This rule as promulgated and maintained, on its face, is unlawfully broad. By its terms, all solicitation, including that related to union activity is barred in working areas, even if employees involved are on nonworking time. See, e.g., *Stoddard-Quirk Mfg*., 138 NLRB 615 (1962); *Times Publishing Co. v. NLRB*, 576 F.2d 1107, 1109 fn. 3 (4th Cir. 1978). However, the complaint makes no mention of the geographic limitation, or the presumptive invalidity that attaches to such a rule. Moreover, neither the General Counsel nor the Charging Party contests the rule on this basis. In my opinion, the facial invalidity of the rule could not be described as a fully litigated issue. Under the pleadings and expressed position of the General Counsel, including the latter's election not to offer the posted rule in evi-

Continued

It also appears that on March 14, at a safety meeting, A. B. Williford informed the work force that the boiler would be shut down and that during that period operations would be conducted a 7-day week basis, with two shifts of 12 hours each. According to Lindsey, Williford also adverted to the fact that people were engaged in organization activity, warning that they were to do so before work, during lunch, and after work, but not on company time. This version, which imposes no limitation based on location, was not entirely consistent with the testimony of Williford. He claims to have read the rule as posted, because, due to the advent of organization, he wished to make everyone aware of the rule in case the time shack posting had been overlooked by employees.

In addition, Williford concedes that the posting was extended to other areas after commencement of the union campaign. Thus, the initial posting was confined to a bulletin board in an area of the time shack where new employees completed their hiring papers, but apparently would be off the beaten track for existing employees. After March 8, the rule was also posted on a bulletin board ''in front of the office and tool room,'' an area frequented by employees on a daily basis.

The General Counsel and Charging Party question the enhanced attention evident in the Respondent's action with respect to union solicitation after the campaign began, apparently, arguing that this combined with the Respondent's condonation of other forms of worktime solicitation, demonstrates that the rule is explainable only in terms of antiunion motivation.

On the contrary, there is nothing sinister in this move to draw broader attention to an existing rule during a period when the risks for the unwary had heightened. No precedent is cited in which such a course—itself equally construable as a gesture of fair play—was deemed to have contributed to a finding of disparate motivation. Nor is such a conclusion warranted by the fact that a supervisor, during worktime, purchased and sold welding gloves and safety glasses, and solicited orders, at a charge of $3 each, for hot meals prepared by his wife.[21] These exceptions were compatible with business concerns by furthering legitimate job needs. As such, they offer no foundation for the serious remedy whereby the Employer would be required to permit all forms of union solicitation during working time.[22] The 8(a)(1) allegation in this respect shall be dismissed.

C. *The Alleged Discrimination*

1. The Covington reprimand

On March 22, A. B. Williford, in the presence of two other supervisors, delivered a written reprimand to Willie Covington, one of the four employee organizers, stating as follows:

> You were observed to be in direct violation of *Sunland Construction Co., Inc*.'s No Solicitation Rule. Specifically you were discussing union activity during normal working hours.
>
> Any further violation of this rule will result in immediate termination.
>
> You are however, free to solicit during Non-Working times as specified under Article No . 7 of the National Labor Relations Act. [See G.C. Exh. 12.]

Tommy Smith testified that he accompanied Williford when the reprimand was delivered to Covington. He avers that Williford told Covington, ''Willie, you have been caught trying to organize, and here is your letter, and if you are caught again, you will be fired.'' Williford was not examined in this regard. Covington testified that he was not informed of any incident that might have prompted the reprimand, and hence was given no opportunity to explain or deny the charge. He did admit that earlier that day, while working, he had a 5-minute conversation with a coworker, described as ''nonunion,'' concerning the two union buttons in use during the campaign. He did not know whether the other employee was reprimanded in any way. He apparently could only surmise that this provoked the warning. No evidence was offered by the Respondent to conform that the reprimand was founded on that conversation.

In the circumstances, the reprimand was an adverse action which, by its terms, was prompted by union activity. The sole offense ascribed to Covington was: ''discussing union activity during normal working hours.'' The vaguely worded citation is broad enough to include periods in which Covington and any coworker involved were not scheduled for work, and hence itself offers no reason to assume the reprimand was founded upon any grounds other than his having been ''caught trying to organize.'' The language of the citation itself transcends what is required of a presumptively lawful rule. See *Our Way, Inc*., 268 NLRB 394 (1983); *Essex International*, 211 NLRB 749 (1974). Thus, the warning, without reference to any other evidence, suffices to establish a prima facie case of proscribed discrimination. The burden therefore was upon the Respondent to show that the reprimand was a privileged form of discipline which would have been invoked even if union activity were not involved. No such evidence exists on this record. In these circumstances, there is no basis for concluding that the discipline was an exercise of the Respondent's right to assure that employees are productively engaged when they are supposed to be working. Accordingly, it is concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing the March 22 reprimand to Covington.[23]

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dence, the Respondent rightfully could assume that the rule was not challenged on the basis of its facial wording. Hence, it had no reason to offer rebuttal evidence justifying the broad restriction on the basis of special reasons related to production and discipline.

[21] The lunch period was 30 minutes, options in nearby St. Francisville for meeting that deadline were extremely limited. Supervisor Jacobs, in this endeavor, provided a convenience to participating employees which helped to diminish one built-in disadvantage of their work situation.

[22] See, e.g., *Uniflite, Inc*., 233 NLRB 1107, 1111 (1977), and cases cited at fn. 10; *Seng Co*., 210 NLRB 936, and cases cited at fn. 3.

[23] My finding is based on the fact that the reprimand involved a proven interdict of union activity, not that it entailed ''enforcement'' of an unlawful rule. That theory is not maintainable on the instant record. Thus, as heretofore indicated, there is no allegation that the Respondent's nosolicitation rule was unlawful on its face, and, further, the evidence fails to substantiate discriminatory promulgation or maintenance. Accordingly, no ipso facto violation would emerge were I to find that this reprimand was coextensive with, and an attempt to implement the Respondent's existing rule.

2. The rainout issues

On March 8, after Respondent was apprised that organization activity had begun, union supporters Davis and Felter did not work beyond 10 a.m. Proponents of the complaint argue that they were sent home, involuntarily, for discriminatory reasons, while the Respondent asserts that they requested, and were given permission to leave at that time.

All agree that it started raining sometime during the shift that morning. At the time, Davis and Felter were engaged in outside work. They took shelter to wait out the weather until a decision was made as to whether or not work would resume. Davis testified that at about 9:45 a.m., Foreman Raymond Hollis sent them home, without offering any explanation. Felter relates that it was prior to 9:30 a.m. when Hollis approached them, stating ''he was going to rain us out; he had no other place to put us.'' Neither was aware of anyone else who was sent home that day.

According to Hollis, that morning, when the rain started, the men, including Davis and Felter gathered at the gang box near the fabrication shop as they normally did when work is disrupted by inclement weather. At some point, because it was only drizzling, Hollis announced that the men would have to go to work, whereupon most started toward their tools. However, according to Hollis, Davis, with Felter standing next to him, spoke up, saying: ''he didn't want to get out in the rain and get wet.'' Hollis allegedly responded that the men had the option, and it made no difference to him if they worked or went home. Hollis insists, with corroboration from foremen Jimmy Broadwater and Johnny Jacobs, that Davis and Felter elected to leave.

On March 9, it was raining again. At 8 a.m., all four union organizers were among the employees in the fabrication shop waiting for assignment. At that time, according to Lindsey, Hollis pointed to all four, telling them they were rained out for the day. Lindsey claims to have asked Hollis if they were the only ones sent home, but got no reply. He avers that the timekeeper told him that they were the first to go.

The Respondent offers the same explanation for the March 9 incident as the day before. At the time, as far as the Respondent knew, the outage would begin when scheduled, more than a week later. Hollis testified that Davis approached him on the morning of March 9, inquiring as to whether there would be a rainout. When Hollis indicated that he did not know, Davis remarked: ''we got some business we would like to take care of, and would it be all right if we went in?'' Hollis expressed his approval, whereupon the four employee organizers left.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) on both days. Credibility is determinative, and despite the mutually corroborative testimony of Lindsey, Covington, Davis, and Felter, in this instance, instinct leads me to accept that Hollis, having witnessed the Williford/Conners confrontation of the day before, would not have attempted to outdo Conners by singling out the organizers for the blatant, totally unjustified act of reprisal which they describe. Therefore while none of the witnesses to these events struck as impeccable, the testimony of Lindsey, Covington, Davis and Felter did not ring true, and I believed Hollis, who was not otherwise implicated in misconduct. Based on his testimony, I shall dismiss the 8(a)(3) allegation involved.

3. Onerous work assignments

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act, on or about March 10, 1988, by assigning more onerous work to Covington, Davis, Felter, and Lindsey. All four testified that within this timeframe they were switched from outside assembly operations in the form of ''tube welding'' to work inside the boiler which was dirty and perhaps even hazardous. More specifically, they describe the interior work as entailing the removal of insulation under cramped conditions, either at its top (penthouse) or at its base (doghouse), with constant exposure to airborne particles of fiberglass and asbestos. The General Counsel contends that this change in duties was a union-related reprisal. The Respondent counters with evidence that the assignments were in consequence of a natural evolution of the job's progress and nondiscriminatory, since shared by others on crews headed by Foreman Joe Molton and Raymond Hollis.

In support of the allegation, Lindsey testified that shortly after the campaign began, his work changed.[24] He claims that, with Covington,[25] he was assigned ''the nastiest and the dirtiest job there was.''[26] The assignment entailed removal of insulation and art gouging at the top of the boiler and at the bottom. As I understand Lindsey's testimony, his complaint stemmed from the fact that the work was performed in tight quarters, with an arc gouger, which utilized a blower, in a work environment in which fiberglass insulation and molten metal is blown everywhere.[27] Lindsey conceded that the work in question was essential to the job, and that the penthouse and doghouse work was carried over for completion by others on the night shift. I did not believe his testimony that on the day shift, he, Covington and Davis were the only employees who worked in the penthouse and doghouse.

Covington testified that after March 10, most of the welders were assigned to cutting tube panels from the boiler, while the four organizers were given the dirtiest job; namely, arc gouging in the ''penthouse'' and ''dog box,'' areas which were full of dust, insulation and flying ash.

Davis testified that after the meeting with Williford on March 8, his work changed. He relates that, ''We just caught

[24] Through leading question by the General Counsel, March 14, was suggested to the witness as the pivotal date. The complaint erroneously describes the alleged harassment as commencing on March 10.

[25] Lindsey and Covington suggest that they were split up following notification to Respondent of their involvement in union activity. However, the Respondent's business records show that they were working on different crews as early as March 7.

[26] Previously Lindsey, a certified pressure welder had been primarily engaged in tube welding, a preliminary assembly operation performed outside before access to the boiler was possible. The allegedly unlawful change was timed by Lindsey to conform with the first day of the outage when the inside work began. In this light, it is understandable that Lindsey on this job had not previously labored under this unwelcome assignment. In passing, it is noted that the assignment of welders to the interior work was perfectly consistent with the objective that boiler work be completed as soon as possible to permit a prompt return to production.

[27] Lindsey was also examined in connection with an assignment involving the cutting down of ''buck stays.'' According to Lindsey the buck stays had large rust buildup which had to be beaten off with a hammer before being cut with a torch. There was no further elaboration as to how this work either was deleterious or beyond that customarily performed by pressure welders.

all the trashy work from then on.'' He relates that the first day back after the rainouts of March 8 and 9, the four organizers were assigned to the doghouse to remove casing.[28]

Felter testified that, beginning on March 10, all four organizers were pulled from the fab yard, and ''we were put on the boiler then.'' He asserts that they were assigned arc gouging in the ''bottom,'' work which first required removal of insulation. Felter testified that he continued to be ''assigned to do that work . . . [u]p until my termination.'' On cross-examination, however, Felter clarified that he worked on other parts of the boiler during that timeframe, performing entirely different tasks. He claims that while he was removed from in tube welding after March 10, two other welders continued to perform that job.[29]

Firstly, in evaluating this testimony, the General Counsel's effort to establish that the organizers were never assigned this type work was somewhat misleading, for, no one had that experience prior to March 14. It was not till then that the boiler was removed from operation so as to permit interior work. Secondly, the initial testimony by all four struck as calculated to create a false perception of the extent, duration and nature of their assignments, in relation to what others were doing during the outage.[30] In this regard, I have not overlooked Lindsey's admissions, as a rebuttal witness that that he only worked 1 day for less than 5 hours in the doghouse and only one shift in the penthouse. He also admitted that this type of work, including art gouging was within the spectrum of duties he had been assigned on union jobs, and that the four organizers were not the only ones assigned this work on the St. Francisville job.

Aside from my preference for the Respondent's documentation, the General Counsel's testimony does not effectively challenge the Respondent's explanation that the change in duties was a function of the status of the job. First, the assembly work from which the organizers were allegedly removed after March 10 was a preoutage operation, hence their removal from tube welding is explainable by the fact that this stage essentially was completed prior to March 10.[31] By March 14, the boiler had been removed from service,[32] allowing access for wide-scale interior work.[33] This outage stage opened with a demolition operation in which the exterior insulating skin which shields the boiler cavity was removed. The job entailed burning, cutting, scraping and art gouging, work which would seemingly create the kind of exposures described by Lindsey, Covington, Felter, and Davis. However, they were not among the first to go inside. Company records show that none of the alleged discriminatees worked inside the boiler on March 14, while three others, not identified as union partisans, were given inside work that day.[34] Moreover, the Respondent's time records show that welding operations declined radically after March 14 with all members of the Hollis crew and the Molton crew thereafter engaged inside the boiler.[35]

As indicated, Foreman Hollis testified that all work performed within the boiler walls was equal in terms of its arduous nature, exposure to deleterious materials, and freedom of movement in performing the work, with all having their good and bad features. Whatever quarrel one might have with this assessment, the Respondent has documented that, as of March 20,[36] such work was performed universally by all members of both crews with no quantifiable pattern of discrimination either in terms of the nature of the work assigned to the discriminatees or the hours dedicated to such work. On balance, apart from my suspicions as to testimony offered on

[28] It will be recalled that Respondent had no access to the boiler until March 14.

[29] Respondent's daily timesheets for the relevant timeframe show that Johnny Jacobs and John Vaclavick were assigned tube welding on March 10. The four organizers were not involved with tubes, but did perform welding that day. Their testimony does not suggest that these three different operations worked that day were less desirable than tube welding. (See, e.g., R. Exhs. 1 and 2.) Moreover, while the deleterious inside work did not commence until March 14, the time records show that no tube welding was performed by anyone during the relevant timeframe after March 10.

[30] For example, it is my understanding that the first stage of operations in the penthouse involved the dirtiest phase, namely the removal of casing. This work was assigned to the Hollis crew on March 15. Lindsey was involved, working the same number of hours as another pressure welder, Vaclavik, who was not shown to be a union sympathizer. In addition, five other crew members, who also were not identified as union sympathizers, worked in the penthouse that day. Covington did remove casing during his entire shift, but Felter was assigned work elsewhere for his entire shift. Davis was absent. As for the doghouse, Hollis testified that pressure welders would not be assigned work other than the removal of casing in that area. This work was assigned to Lindsey, Covington, and Davis on March 16. Pressure Welder Vaclavik worked elsewhere for his entire shift, as did Felter. On March 17, neither Lindsey, Felter, nor Covington worked the doghouse. Vaclavik spent 4 hours and Davis worked two in that area. Moreover, Felter testified that as of March 10 he ''started'' working in the bottom removing ''lagging'' and insulation and starting to gouge the bottom loose. He avers, incredibly, that he continued to perform such work till terminated on April 4. According to Respondent's time records, the reliability of which is accepted, Felter at no time worked in this phase of the operation.

[31] Based on the credited testimony of Foreman Hollis, which comports with R. Exhs. 1 and 2, I find that, although such work reemerged at later stages, this did not occur until after the boiler had been reassembled. The claim of mistreatment by the General Counsel's witnesses pertained to the interior phase involving work preparatory to reassembly of the boiler. My acceptance of Hollis general testimony that all work inside the boiler was hard and arduous, with dust, insulation and debris throughout does mean that I would go so far as to adopt his view that this work was equally distasteful, whether or not performed at the top or bottom of the boiler.

[32] The boiler went out of service on its own on Saturday, March 12, almost 2 weeks ahead of schedule due to an operational failure. On March 13, it was decided to begin the outage, rather than undertake repairs and temporarily restore operations.

[33] References to inside work does not mean inside the boiler cavity itself. That area is isolated by an interior wall. No work was performed within that wall. The inside work was performed within the boiler building between the exterior and cavity wall. See R. Exh. 4.

[34] See generally R. Exhs. 1, 2, and 3.

[35] These records show that Felter was the only welder assigned to a welding operation during the relevant timeframe after March 14. Thus, Felter on March 15 and 20 was assigned to a crew in which he alone was to perform welding. See R. Exhs. 1 and 2.

[36] Counsel for the Respondent on the final date of the hearing represented that Company records beyond March 20 were available but that those offered did not extend beyond that date because told, during the investigation of the case, that the complaint focused on the earlier timeframe. The General Counsel neither denied that this was so, nor sought to amend the complaint in a fashion which would have required a broader sampling. The Respondent's counsel was informed by the undersigned that under the allegation of the complaint, his proffer was ''adequate.''

behalf of this allegation in the complaint, the more reliable business records tend strongly to confirm that other members of the Hollis/Molton crews worked substantial man hours on the floor and roof area and I am not convinced that the General Counsel has substantiated that Lindsey, Covington, Felter, or Davis received prejudicial treatment in this respect. In any event, the Respondent has demonstrated that these assignments would have been made had union activity not intervened and, accordingly, the 8(a)(3) and (1) allegations in this respect shall be dismissed.

4. The discharge of David Felter

Felter was terminated on April 4, allegedly because of attendance problems. The critical events coincided with the boiler outage, when Respondent's employees were scheduled to work 7 days per week, 12 hours per day. Thus, on March 26, Felter injured his knee while on the job. The Respondent's safety coordinator, Louie Lewis, diagnosed the injury as torn ligaments. Lewis drafted an accident report and told Felter to go home, to soak the knee in a hot tub and to wrap it with an ''Ace'' bandage. However, Felter declined to go home. Instead he returned to work, completing his shift. Felter also reported to work the next day, March 27, but was given light duty. He again took off on March 28 because of the injury. Thereafter, he returned, working without incident on March 29, 30, and 31 and April 1.

On Saturday, April 2 and Sunday April 3, Felter neither called in, nor reported for work. Felter explains that he was out of work that weekend because his leg had swelled again, ''it was really hurting.''

Felter was discharged upon reporting for work on Monday, April 4. At that time, he was given a termination notice, which grounded the termination solely upon ''excessive absenteeism.'' (G.C. Exh. 14.) Felter was never asked by management if there were any explanation for his absences.

Felter testified that he was aware of company policy requiring him to contact the Company to report absences. Moreover, credible testimony establishes that the following policy had been distributed in January and since then was posted at the jobsite:

> EXCESSIVE ABSENTEEISM AND HABITUAL TARDINESS WILL NOT BE TOLERATED AT THIS JOBSITE, AND WILL BE GROUNDS FOR IMMEDIATE DISMISSAL. ABSENCE OF THREE (13) CONSECUTIVE WORK DAYS WITHOUT PROPER NOTIFICATION OF SUPERVISION WILL RESULT IN TERMINATION. TARDINESS AND REPEATED ABSENCE WILL ALSO BE GROUNDS FOR TERMINATION. IF IT IS NECESSARY FOR AN EMPLOYEE TO BE ABSENT, HE OR SHE SHOULD NOTIFY HIS OR HER FOREMAN AND/OR SUPERINTENDENT.
>
> THERE WILL BE NO EXCEPTIONS TO THE AFOREMENTIONED RULES. [R. Exh. 6.]

Considering Felter's role in the union campaign, and the evidence of union animus, one might rightfully infer that his discharge only a few weeks after the organization drive began, was motivated at least in part by union activity. See *Wright Line*, 251 NLRB 1083 (1980). On the other hand, indisputable evidence demonstrates that Felter elected to take a weekend off during the critical outage period. He did so, without calling in, a responsibility he admittedly was alert to. Having worked as expected on 4 consecutive days after his injury, this omission, while taking a weekend off, would hardly be dismissed as trivial. Moreover, I cannot agree, against this background, that Felter's sudden failure to report, a week ater the injury, would necessarily have been associated with the leg injury.[37] Indeed, there is no evidence that Felter, prior to completion of the job, ever communicated, or attempted to communicate such an explanation to management. To do so, was his responsibility, and he knew it. In the total circumstances, Felter's absences without notice, during a critical phase of the job, as compounded by seven counts of lateness, strikes as sufficiently serious to warrant the conclusion that the Respondent would have taken the same action even if Felter had not engaged in protected activity.[38] There being no clear, credible evidence that the Respondent tolerated absenteeism during the outage, comparable to Felter's case,[39] it is concluded that the evidence fails to support a conclusion that the Respondent violated Section 8(a)(3) and (1) through this discharge.

5. The discharges of Charles Bowman and Scott Gibson

Bowman and Gibson were hired at St. Francisville during the second week of March. They were friends, who shared an apartment, and worked together as pipe welders on the instant project. Donald Hughes was their immediate supervisor; he in turn reported Jimmy Broadwater, the pipe foreman.

Neither had any prior affiliation with a labor organization. Both signed union cards.[40] They also were given union buttons which neither wore for fear of reprisal.

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[37] Counsel for the Charging Party's argues that Williford must have been aware of Felter's knee injury. Even were this the case, it would not necessarily establish that Williford had reason, in light of intervening events, to assume that the weekend absence, without notification, was related to that injury. As I see it, having worked the previous 4 consecutive days without incident, there were no mitigating circumstances, so obvious as to excuse Felter from the duty to communicate under Respondent's policy.

[38] Felter's attendance record included seven counts of lateness. The Charging Party argues that this may have been overstated, in that it might have included incomplete days on March 9 and 10 when Felter was given permission to leave early. This is a matter that counsel should have clarified through review of the actual records which, at the hearing, the Respondent was directed to make available on request. Absent pursuit of that option, I am unwilling to speculate beyond the facial import of the attendance summary. (R. Exh. 5.) Moreover, I also disagree with the Charging Party's claim that the Felter discharge was inconsistent with the Respondent's published attendance policy. The latter as written and applied does not limit Respondent's discretionary authority to cases involving of three consecutive absences, without notice.

[39] Felter testified that a coworker he believed to be Guy Bigger missed work, ''For a while there, it was like one day a week . . . generally on a Monday.'' Felter added that ''it seemed like'' an ironworker, James Bell, also missed work ''regularly.'' Respondent's payroll records show that Bell was only absent on two occasions before his discharge on April 5. See R. Exh. 6. In this light, it was my impression that Felter was not competent to provide unexaggerated, objective, reliable testimony as to the attendance records of coworkers. In evaluating this evidence, it is also noted that Respondent's testimony seemed entirely plausible insofar as it relates that less latitude was given to attendance problems during the outage than during earlier stages of the job.

[40] Both claim that they obtained and signed cards in the lunch area in the presence of Foreman Wayne King, an admitted supervisor. Their testimony in this respect is not entirely consistent. Bowman,

Continued

They were discharged on April 16, in the midst of the boiler outage. Their termination notices listed ''insubordination'' as the sole cause.

In this respect, the Respondent maintains a ''roll-up'' policy whereby work ceases 15 minutes prior to the shift's end. During this period, workers are expected to clean their area and return company tools to the toolroom and personal tools to a nearby gangbox. According to the Respondent's evidence, an unwritten, unpublished corollary of this policy precludes employees from leaving their work areas prior to the end of their shift.

On April 14, Jimmy Broadwater, the pipe foreman, who supervised Bowman and Gibson, was being verbally reprimanded by Williford for several problems in the pipe department. In the process, at about 5:25 p.m., Williford eyed Bowman, Gibson, Randy Stalsby, and Brooks Warren, all members of Broadwater's crew, out of their work areas. Williford angrily told Broadwater to correct the problem, warning that if he did not, he would replace Broadwater with someone who would. Broadwater then approached all four, who were at the fab shop, about 200 yards distant from the boiler, and told them that they would be discharged if they failed to stay in their work area ''until it was time to go.'' Broadwater credibly testified that all four reacted negatively to his warning, with Warren in particular describing the requirement as ''just bullshit.''

On April 15, when the men reported for work, Broadwater, pursuant to instruction from Williford, conducted a meeting to inform his crew that ''you had to stay in your work area until 5:30.''[41] That afternoon, Williford, Foreman Don Hughes, and Broadwater stationed themselves where they could observe the crews leaving work. At about 5:25, Bowman, Gibson, Stalsby, and Brooks, were detected again on their way out before quitting time.[42] Williford asked Broadwater what he was going to do about that, whereupon Broadwater said he would take care of it. Broadwater asserts that he could not possibly catch up with his men, and hence did not talk to them that day.

Broadwater had intended to confront all four the next morning, April 16. However, only Stalsby and Brooks were available at starting time. Broadwater testified that when Bowman and Gibson failed to appear by 8:30 a.m., he called the timekeeper, instructing that they be discharged.

Bowman and Gibson do not deny that they were informed of the policy and told by Broadwater that they could be discharged for early departure.[43] They admittedly overslept on April 16.[44] All agree that they sought out Broadwater after learning of their discharges. Broadwater admits that this was so, but states that he informed the men that ''if they couldn't come to work and listen to what I had to say, then I didn't need them.''[45]

It appears that, on the day before the terminations, Foreman Don Hughes was informed that Bowman and Gibson had become sympathetic to the Union. Thus, on the morning of April 16, Bowman and Gibson arrived at work and ran into Stalsby and Warren in the parking lot. The latter were wearing their union buttons, Bowman and Gibson were not. Walking in together, they encountered Foreman Hughes, who looked at the button worn by Stalsby and stated: ''Oh, you got organized now.'' Bowman, who like Gibson, was not wearing a union button, claims to have responded, ''Yes, we all have.'' Hughes chuckled and sent the men to work.[46]

The evidence presents a puzzlement. Stalsby and Brooks were retained, even though they, unlike Bowman and Gibson, brazenly manifested their support of the Union by wearing ''solidarity'' badges on the job. In contrast, in the case of the alleged discriminatees, known union activity is substantiated solely by Bowman's somewhat oblique, off-handed remark to Hughes.

Nevertheless, Broadwater's actions are in consonance with pretext. First, he did not discuss discharge with anyone before taking this step, though consultation as to such action was among the restrictions imposed by the Respondent's labor counsel at the March 11 strategy session. Second, the discharge slip made no reference to any lateness or attendance problem.[47] It listed only ''insubordination'' as the

acknowledged that he did not know whether King was paying attention to what they were doing at the time. He relates that King may or may not have seen the card returned to Lindsey, although facing Bowman, while eating a sandwich only 10 to 15 feet away when the card was signed. Gibson relates that, as they were signing the cards, King walked in and was standing there looking at them from only 8 feet away. Unlike Bowman, Gibson was sure that King saw what had transpired. This testimony was not sufficiently persuasive to warrant an inference that King learned of, or suspected that either was a union supporter.

[41] Broadwater's understanding of this unpublished rule varied from that of Foreman Johnny Jacobs. Thus, though the latter described the practice as one followed throughout the industry, he related that the employees were required to return to their immediate work areas and could not wait till quitting time in the tool room. According, to Broadwater, employees were permitted to wait in the toolroom area.

[42] The dischargees testified that on April 16 they left the tool area only after observing a rigging foreman name ''Pancho'' leaving the area followed by a bunch of men. Bowman and Gibson claim to have been unaware of the time. Yet, they fell in behind the group. Williford agrees that Pancho and riggers under his jurisdiction were among those spotted as leaving early on April 16. He relates that he called him down the next day, issuing a severe reprimand and threat of termination, in turn, receiving Pancho's assurance that the rule would be adhered to in the future.

[43] Bowman and Gibson claim that they were warned by Broadwater only ''once.'' I believed Broadwater that the rule was called to the attention of the offenders on the evening of April 15, and, again, to his entire crew, including the offenders, at a gang box meeting on the morning of April 16. I also reject the testimony of Bowman and Gibson that Broadwater told them on April 15 that Williford had ''established'' this restriction as a ''new'' rule. Although initially skeptical, I have been educated and now am persuaded that this rule designed to maintain traffic control, effective cleanup activity, and isolation of construction employees from areas utilized by the customer's operations, is embedded in industry practice and an established, if not well published, aspect of the Respondent's employment practices.

[44] Bowman testified that they were 1 hour late. Gibson initially agreed. However, the latter's prehearing affidavit averred that they were 2 hours late. When confronted with that document, Gibson testified that it was 1 or 2 hours. In this light, I regarded Broadwater's testimony that they had not arrived by 8:30 a.m. as entirely credible.

[45] According to Gibson and Bowman, Broadwater did not, at that time, mention their lateness as a basis for the discharge.

[46] Hughes did not testify. Moreover, in its posthearing brief, the Respondent appears to incorporate Bowman's remark as part of its factual presentation (p. 92, fn. 45). The Respondent does not contest knowledge.

[47] The Respondent offered no proof demonstrating that either dischargee had a pattern of lateness or absenteeism.

cause, a factor later diminished by Broadwater as merely ''a factor, but . . . [not] . . . the leading factor.''[48] Third, Broadwater described Bowman and Gibson as ''key people,'' yet both were terminated suddenly, during the critical shutdown stage, when any failure immediately to secure competent replacements would have dramatic consequences.

While the issue is not free from doubt, on balance, I am convinced that a violation is warranted under the Wright Line formula. The discharge occurred the day after the Respondent discovered that Bowman and Gibson had elected to support the Union. The timing, together with the Respondent's clear opposition to unionization give rise to an inference of discrimination which is enforced, rather than allayed, by a defense, which was significantly lacking in qualities of consistency and plausibility.[49] In sum, not only do I find that an inference is warranted that union activity was at least a part of the underlying motivation, but it is concluded further that the Respondent has failed to demonstrate credibly that the same action would have occurred in the absence of protected activity.[50] Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) by discharging Bowman and Gibson.

6. Alleged discrimination against job applicants

a. *The batched applications*

The complaint alleges mass discrimination on the basis of Respondent's refusal to hire from applications submitted by union representatives on March 9,[51] March 17,[52] March 25,[53] and April 6.[54] The Respondent has conceded that since March 9, it hired workers for jobs within the spectrum of qualifications possessed ostensibly by some, if not all, of the those who completed said applications.[55] These applications, however, were not used as a source of new hires.

The Respondent first contends that it had no obligation to respond to the tender of batched applications because such filings were outside the preference system followed under the Respondent's existing hiring practice.[56] In the alternative, it is argued that the applications as a class should be disregarded as a matter of law, since merely a ploy, designed to give the Union an advantage, without regard for the interests of incumbent employees. The Respondent further observes that imposition of any duty to hire would derogate from the fundamental principle that hiring decisions under the Act may not be based on union or nonunion status, and would enable a labor organization to pack a unit under conditions subverting freedom of choice.

At the threshold, it is noted that factually, the General Counsel has sustained its burden of proving that union considerations contributed, at least in part, to the Respondent's inaction with respect to the batched applications. This refusal continued, on and after March 9, a period in which the Respondent's manpower needs heightened, causing the Respondent to hire boilermakers and pressure welders from other sources. Moreover, while union applications were spurned, at least two of its supervisors, Ron Jordan and William Bayless, were soliciting rank and file employees to assist in the effort to attract ''nonunion'' craftsmen.

These factors are understandable in light of the extraordinary threat union organization presented to this operation. It would defy reality to ignore that collective bargaining is antithetical to economics behind the business objectives of this nonunion contractor, whose success depended on its ability to underbid competitors, union and nonunion alike, and

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[48] No explanation is offered for the discrepancy between the documented reason for the discharges and Broadwater's current testimony. At a minimum, a clear shift in emphasis has emerged. Since it is fair to assume that the content of the termination slips was a product of Broadwater's direction, it is difficult to accept that he would have omitted reference to the attendance problem were that truly foremost in his mind. After all, when Broadwater instructed the timekeeper to effect the discharges at 8:30 a.m. on April 17, he was alert to the fact that Bowman and Gibson had not yet arrived. The circumstances suggest that the attempt to give empirical weight to the lateness was afterthought, perhaps to overcome the real or imagined problem encountered by the Respondent's failure to take steps against Stalsby and Warren, who were equally guilty of ''insubordination.'' Concern might also have existed for the conduct of ''Pancho'' and his crew in connection with this very rule. In any event, the lateness ground is also questionable. The Respondent's summary of those terminated on the basis of attendance problems does not list Bowman and Gibson. R. Exh. 5. In this light, while I have serious reservations as to the credibility of Bowman and Gibson, I was inclined to believe that Broadwater's postdischarge remarks to them omitted reference to their lateness.

[49] See, e.g., *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977).

[50] Cf. *Midwest Electric Mfg. Corp.*, 260 NLRB 174, 178 (1982), where the Employer explained the layoff in plausible, entirely credible terms. While the treatment accorded known union supporters Stalsby and Warren tends to argue against union causation, this is just one factor, which in this instance is outweighed by other logical inferences. While I need not speculate as to why Respondent selected from among known union supporters in effecting the discrimination, as a general rule, the termination of all similarly situated, known union supporters will often cut loose needed skills and hence, prove infeasible.

[51] G.C. Exhs. 5(a) through (mm).

[52] G.C. Exhs. 11(a) through (aa).

[53] G.C. Exhs. 7(a) through (l).

[54] G.C. Exhs. 10(a) through (v).

[55] During the hearing, an issue arose as to proof necessary to authenticate the numerous applications involved. After being warned that the undersigned would prefer individual authentication by the signatories, counsel for the General Counsel called a handful of alleged applicants. This time-consuming process was abandoned when the Respondent agreed to reserve on the issues of authenticity and whether the applicants themselves held a sincere interest in securing employment. This concession was made without prejudice to the Respondent's right, during any appropriate compliance proceeding, to disqualify individual applicants on either ground. Finally, as part of the accommodation, a qualification was placed upon the presumption that said applications were tendered on the above dates. Thus, prior to the close of the General Counsel's case, the parties were advised that the proponents of the complaint would not be benefitted by any such inference with respect to applications dated prior to March 7. Instead, as to these earlier applications, specific, credible testimony, would be necessary before any would be deemed within the alleged discriminatory class. Subject to these conditions, it was agreed that, provisionally, for purposes of determining liability, that a presumption exists that the applications identified as having been submitted by the Union were in fact delivered on the dates alleged.

[56] At the hearing, counsel for the Charging Party was foreclosed from presenting proof that each of the numerous individuals whose names appear on the applications were qualified to perform available work. Since, neither the applications, nor their content, were considered by the Respondent, the competence of the individuals involved is not relevant to an assessment of the Respondent's motivation for denying them employment.

once projects are awarded, to complete them within the allotted timeframes.

The St. Francisville job exemplifies the Respondent's special vulnerabilities. The campaign began just before the start of the scheduled 56-day outage, and the expansion of the work force inherent in that phase of the job. On this project, the price had been fixed and predetermined, meaning that any bargaining concessions in economic areas would necessarily come from expected profits. With this in mind, any possible strike action, considering the heavy liquidated damages to be incurred for delayed completion, posed a serious threat, which would become more formidable with each hiring of a Local 582 member. Thus, it was not surprising that weld inspector Smith admitted that Williford was ''hot'' after learning of the campaign. Furthermore the credited testimony that Smith informed Lindsey that Williford would not hire from the batched applications comports with Williford's own expression of doubt that he would hire an experienced hand whom he firmly believed ''would come onto the job with the intention of organizing.'' In the circumstances, there can be little doubt that the General Counsel has fulfilled his initial burden of proving that union considerations were at least partially involved in the Respondent's failure to act on the batched applications.[57]

The Respondent would rebut this inference on grounds that its hiring on the St. Francisville job did not rest upon proscribed considerations, but merely involved implementation of an established, nondiscriminatory hiring practice. As for the evolution of this policy, the Respondent states that: ''In order to understand Sunland's hiring practices at St. Francisville one must consider the history of the Company and its prior efforts in obtaining employees.''

Before doing so, one might observe that, as is typical of the construction industry, the Respondent draws labor from a fluid complement of craftsmen and supervisors who shift between jobs and contractors as soon as work runs out and other employment opportunities appear. To the Respondent and its nonunion competitors this would appear to present a genuine challenge. Perpetual access to labor is a key to success in this industry where a profitable venture may quickly be reversed through completion delays which allow customers to invoke costly liquidated damage provisions. Once a job is awarded the effort to attract competent help is an immediate priority. The task is complicated by inability to secure craftsmen from union hiring halls, thus, denying the merit shop employers a reasonably fixed local labor pool. Instead, they often depend on nonresident workers, who must bear the expense of a second residence. Since the boiler outage projects, which are the Respondent's specialty, normally are short term, this additional expense might well dissuade competent workers from accepting employment beyond commuting distance. Moreover, the absence of an identifiable pool of local craftsmen would have its most profound effect upon manning during the course of a job. At that time, the Respondent and its competitors must have access to competent help as the need arises on projects in which manpower demands are far from constant, and the timing and extent of turnover is unpredictable.[58]

The Respondent suggests that it is able to satisfy its manpower needs without ties to the local labor market and without hiring unknowns on the basis of applications. It concedes that this was not always the case. At the time of the events in issue here, the Respondent had been in operation only 3-1/2 years. Early in its history, it obtained workers from applications and newspaper solicitations. It avers that this approach did not attract competent employees. Thus, on its first job, at Crossland, Arkansas, difficulties were encountered because use of ''unknown sources'' did not permit identification and hiring of qualified help. The project was termed a ''disaster'' basically because the job was performed with an ''inadequate employee base.''

It was believed that this problem would be eliminated through the hiring of A. B. Williford as General Superintendent. Among his attributes, Williford's experience with merit shop employers, particularly ''Brown & Root'' gave him a following of skilled personnel. Testimony was adduced by the Respondent that, under his control, a new policy emerged whereby future jobs would be manned by craftsmen whose competence was known either by Williford or his superintendents.[59] Testimony was offered to the effect that the Respondent no longer would concentrate upon the immediate labor market or hire on the basis of ''cold'' applications as it had at Crossland.[60] However, it continued to take applications, which it solicited, and acted upon in emergency situations.[61] It also continued to advertise in newspapers for

[57] Contrary to the Respondent, it was unnecessary for the General Counsel to adduce proof of disparate treatment until evidence is offered demonstrating that the Respondent acted on legitimate grounds. Moreover, absent evidence that the Respondent, after March 8, was receptive to hiring active members of Local 582, its pleas concerning the hiring of union members generally does not offer a basis for cleansing the obvious bias held against organization of this project by that Union.

[58] Under a hiring hall, management normally can fill vacancies as they arise with reasonable immediacy by a single phone call. Although there may be important disadvantages in this process, the imponderables, awkwardness and delays built in to other means of attracting qualified craftsmen generally are eliminated through the hiring hall system.

[59] It is a fundamental truism that those persons who are known by management to be qualified job prospects offer the most suitable labor pool. Certainly that group would be offered a preference under any discretionary hiring practice. However, as the Respondent was informed at the hearing, this is merely an abstraction, unless enforced by proof that on and after March 9, applications submitted through Local 582 designees were not considered because all hired thereafter were either former Sunland employees or persons whose abilities were known by supervision. Williford concedes that there were exceptions and that there probably were some hirings at St. Francisville based merely upon applications. Indeed, imponderables such as unanticipated turnover in the form of quits and discharges, the elements of timing, geography and the availability of known prospects would naturally put a strain on the effectiveness of grape vine hiring.

[60] At St. Francisville, the Respondent did hire from applications routinely in certain categories. Thus, laborers, helpers, carpenters, cement masons, and electricians were hired on this basis. According to A. B. Williford, this exception was based upon the fact that this group included craftsmen not customarily employed in recovery boiler outages and hence were unfamiliar to management. Also included were low wage employees most of whom could not afford two homes and therefore would be available only in the immediate labor market.

[61] For example, Thomas Smith, a quality control inspector on the St. Francisville job, testified that if someone called him, and had

''boilermakers'' in conjunction with specific projects. As a further exception to its policy of hiring only those who were ''known quantities,'' the Respondent has sought to fill its manpower needs by contacting competitors. Moreover, the names, addresses, and telephone numbers of all applicants were included in a data base maintained at company headquarters in Houston, Texas.

At best, the Respondent's evolving hiring practice established a preferred course, whereby it would first hire through reference. I am not persuaded, however, that this priority totally displaced newspaper advertisement, and the hiring of unknowns solely on application.

The Respondent apparently seeks to strengthen its hand by observing that ''there is no evidence whatever that Sunland changed its practice after March 8 from hiring those persons of whom it had knowledge, rather than hiring from applications.'' It is true that no party to this proceeding saw fit to adduce proof identifying each of its individual employees by method of hire during any timeframe. However, in the circumstances, this omission lends no comfort to the Respondent. Thus, as heretofore indicated, the General Counsel has substantiated a prima facie inference of proscribed discrimination. Under *Wright Line*, supra, the burden was on the Respondent to demonstrate that the batched applications would have received the same consideration even if not submitted through the Union. This proof responsibility did not end, simply upon a showing that Sunland generally preferred to hire craftsmen whose ability was known by supervision. The inference of union-related discrimination would be countered only upon specific, credible proof either that this preference was exercised with respect to each of the numerous vacancies filled after March 8, or that persons hired during that timeframe were preferred over union supported applicants pursuant to some other legitimate criteria.[62]

The failure of the Respondent to meet its burden under *Wright Line* does not end the inquiry. For the alternative defense sidesteps the motive issue. In this respect, the Respondent argues that, on policy grounds, it should be excused from lending aid and comfort to the Union by hiring the latter's designees.

The Respondent's contention focuses on the Union's motivation, and the question of whether employee interests would be furthered, or impaired, were the Board to make itself a party to the Union's strategy.

One aspect of the intent underlying the Union's hiring strategy is undeniable. The applications were its cornerstone. The Charging Party virtually concedes that they were solicited from its membership in furtherance of its ''strike back strategy'' in which the Respondent was one of several nonunion employers targeted for ''organization.''

Although the Union might argue otherwise, enhanced employment opportunities for the Local 582 membership was merely incidental to that venture. While it is presumable that some, if not all, of the applicants sincerely needed employment, the Union held to assurances that this group could be counted upon to further that effort. For, as union members, whatever their employment needs, those completing applications were not free to accept employment on that job without union permission. Thus, article XVII, section 1(t) of the Union's constitution provides as follows:

> No member shall accept employment with a non-union contractor without prior written approval by the business manager or where there is no business manager, by the President of the Local Lodge having the jurisdiction over the territory.'' [C.P. Exh. 1, p. 65.]

This restraint upon a member's employment options reflects traditional union goals of preserving negotiated labor standards by withholding skilled members from nonsignatoy employers. It therefore is fair to assume that the prohibition would be relaxed only in furtherance of institutional union objectives. For example, when Business Manager Simoneaux issued such waivers to Lindsey, Covington, Felter, and Davis, the forms used included preprinted language, stating:

> Let it be known, that the above Member is hiring on for the purpose of organizing only. [C.P. Exhs. 3(a)-(c).][63]

The utilization of this strategy in the Union's ongoing struggle with nonunion contractors strikes as a perfectly legitimate attempt, to turn to its advantage, the fears of employers who compete on the basis of an entirely different set of labor standards. However, I hold no illusions that there was genuine interest in securing organization of an employee majority on this project as contemplated by Section 9 of the Act. Thus, it is fair to infer that the Union was well acquainted with boiler outage work, and through its employee organizers, must have known that the St. Francisville project was only about 2 months short of scheduled completion when the initial group of applications were submitted. Also obvious was the fact that any question concerning representation would have to be resolved and bargaining consummated within this limited timeframe. For, considering the transient nature of the work force and the limited duration of projects in this industry, the Board's traditional bargaining unit determinations would sanction an election on a project only basis. See, e.g., *Arthur A. Johnson Corp.*, 97 NLRB 1466 (1952); *Temp, Inc*., 235 NLRB 1466 (1952). In other words, absent

skills in an area that were needed, they would be told to ''come out.''

[62] In fact, there is evidence that hiring after March 8 was not limited to boilermakers and welders having prior experience with Sunland, or known by or on lists maintained by Williford or his subordinates. First, credited evidence verifies that supervisors during that period were actively soliciting prospects from subordinates. Second, Williford testified that, though he could not be sure, he estimates that two boilermakers were hired from applications after March 8. My own impression is that the Respondent, quite possibly utilized lists and recall of supervision to support initial manning. However, this procedure declines in value when, in the course of a project, particularly during an outage, craftsmen suddenly terminate for one reason or another. Although the issue need not be reached, the ''cold calling'' of persons, who reside over a vast geographic area, to test, on a hit or miss basis, their availability and interest in employment is too loaded with imponderables, too time-consuming, and too inefficient to offer a plausible basis for filling vacancies with any degree of immediacy. Moreover, if lists of prospects were maintained by Respondent's functionaries, the Respondent would have been in a position to present them, and to this extent demonstrate the frequency, if any, with which employees were hired after March 9 on that basis.

[63] Local 582's business manager, John Simoneaux, testified that permission would not be granted until employment was secured.

employer assent, there would be no enforceable bargaining obligation, following completion of the job. From the foregoing, the implication should have been clear to all; i.e., organization of this short term project was too impractical to be a realistic goal.

At the same time, the Union rightfully would anticipate the Respondent's reaction to the batched applications. Thus, in formulating this plan, the Union would have been mindful that outage jobs are awarded pursuant to competitive bidding, that cost-wise, they are labor intense, that the price is fixed, and that completion delays are unacceptable. For these reasons alone, it was foreseeable to a reasoned certainty that this ''merit shop employer,'' in such circumstances, would avoid hiring those commended by the organizers themselves. There is little doubt in my mind that this was the consequence sought by the Charging Party, and that backpay, rather than bonafide organization, was the cornerstone of its strategy.

It is not farfetched to regard the ''strike back'' strategy as built upon a form of entrapment reminiscent of other ''blackmail'' devices which in 1958 led to enactment of the 8(b)(7) strictures on recognition picketing. It is true that neither picketing, nor secondary activity was directly involved here. Instead, the employee protections of Section 8(a)(3) were central ingredients of a scheme whereby an unorganized employer would be pressured to capitulate, go out of business, or face recurring union sponsorship of mass applications in the midst of future projects. From my perspective, a serious question arises as to whether, through the complaint in this proceeding, the Board has been conscripted as an unwitting conspirator in the effort to achieve union goals—be they organizational or economic—through pressures, rather than through the statutory procedures designed to assure that compulsary bargaining begins with procedures preserving freedom of choice.

My own uneasiness with this possibility offers no comfort to the Respondent. Its avoidance will require development of an eclectic rationale, to limit the trend reflected under present Board law. Thus, there can be no question that the members of Local 582 who completed, signed, and offered applications to the Union, were implementing their Section 7 right ''to form, join, or assist labor organizations.''[64] As to such a class, I am alerted to no precedent which might support a withholding of Section 8(a)(3) on the basis of a labor organization's motives.[65] Authority, which I am bound to follow, is to the contrary. Thus, the Board has repeatedly held that employers may not lawfully refuse to hire paid, full-time, professional union organizers, even if they seek employment for the ulterior purpose of unionization. See, e.g., *H. B. Zachry*, 289 NLRB 838 (1988), and cases sited therein.[66]

In this light, it is with extreme hesitation that I reject the Respondent's plea that Section 8(a)(3) not be invoked to further the hiring scheme evident on this record. It is conceivable that the precedent might be distinguished on the ground that the use of mass applications went too far as a manipulative design seeking to enmesh the Board, as an instrument of pressure, in a private labor dispute. There is little question in my mind that the Union, through the mass applications, sought to establish, with the Board's imprimateur, an enforcable hiring arrangement which would force the Employer to choose between hiring the Union's designees, on the one hand, or confronting the Board and its remedial authority, on the other. Were this tactic invoked genuinely to obtain representation, through free expression by an employee majority, the case might be viewed differently. However, as matters stand, concern exists that the mass applications were key to the Union's effort to manipulate the statutory process as a source of pressure, to further private, institutional goals.

Nonetheless, the precedent is too broadly stated to allow an otherwise unlawful act of discrimination to be excused on the basis of the union's intent. Accordingly, it being my duty to adhere to current Board law, and as the evidence substantiates that the Respondent acted on proscribed considerations, it is concluded that it violated Section 8(a)(3) and (1) of the Act by refusing to hire on the basis of applications submitted by union representatives on March 9, 17, and 25 and April 6,[67]

b. *William Creeden's individual application*

William Creeden, since January 1987, has been a general organizer employed by and on the payroll of the International Brotherhood of Boilermakers. His organizational responsibilities cover vast areas of the United States and Canada. He was assigned to several campaigns in the Baton Rouge area, including Respondent's job at St. Francisville. His job duties include ''hiring in'' with nonunion employers in furtherance of his responsibilities as an employee of the International. In the past, Creeden worked in the trade as a boilermaker, tube welder, and pressure welder. He has not been employed by a union contractor since 1984.

On or about April 6, Creeden, together with International Representative Anthony Yakemowicz, obtained blank applications, completed them, and filed them at the jobsite with

[64] There is no merit in the Respondent's view that those signing applications were not ''employees'' within the meaning of Sec. 2(3) of the Act. For, the statutory definition is broad enough to include those who seek work with a particular employer, including those intent on union organization. See *Pilliod of Mississippi*, 275 NLRB 799, 811 (1985).

[65] ''Unit packing'' cases [see, e.g., *Airborne Freight Corp*., 263 NLRB 1376 (1982)] do not furnish a relevant yardstick, for here, the Respondent's obligation was not to afford priority to the union applications, but to evaluate them against other prospective employees in accordance with nondiscriminatory criteria. Had it done so, the Employer would not have been guilty of any form of proscribed assistance.

[66] Undoubtedly, the Union's strategy involves an important extension of the interest protected in *H. B. Zachry*, supra. In this case, the Respondent reacted to applications, not applicants. Thus, the mass filings are not equatable with individual action by persons who, on there own, proceed directly to a jobsite or personnel office to perfect an application. Here, the Union, in developing its strategy, designated itself as agent to perform that step on a mass basis. Nevertheless, there is no suggestion in *Zachry* or other cases in that line of authority which would warrant a different result on these facts.

[67] With respect to applications delivered on April 6, Creeden identified Timekeeper Stokes as the individual with whom he spoke on that date. Williford had testified that it was Stokes, prior to March 21, who had identified Creeden to Williford, describing him as a union representative. In the circumstances, I infer that the Respondent had clear reason to believe that the April 6 applications were part of the Union's strategy.

Timekeeper Stokes. Creeden was straightforward in defining his status on that document. Thus, he listed his present employment as ''union organizer'' and his present employer as the Boilermakers Union. (G.C. Exh. 10(v).)

The April 6 submission, including Creeden's application, is the subject of a composite allegation in paragraph 9(d) of the complaint. My findings with respect to that allegation are set forth above and, having sustained that allegation, Creeden is with the group of discriminatees potentially entitled to relief under that finding. However, Creeden is also covered by a separate allegation set forth in paragraph 9(i) of the complaint which is apparently founded on an alternative theory that the denial of employment in his case was accompanied by specific evidence of antiunion motivation.

In this respect, it appears that Creeden met Williford, while both happened to be present at a local saloon on March 21. Employee Davis had been fired that day and he and Felter were with Creeden at the time. When Williford together with a James River management representative entered, Creeden approached them, was introduced, describing himself as an out of work tube welder. Creeden told Williford he needed a job. Williford, who was aware of Creeden's true identity, told him to come to the jobsite and fill out an application. Williford told Creeden that he lost welders that day and could lose more.[68]

On April 1, Creeden signed and filed an unfair labor practice charge on behalf of the Union. His own application was completed and filed on April 6.[69]

On April 19, the strike began. The complaint dates the instant allegation as having transpired on April 21, in the midst of the strike. Creeden testified that on this latter date, when he telephoned the jobsite and inquired about vacancies, he was referred to Foreman Ray Hollis. Creeden told Hollis that he had heard they might be needing some welders. Hollis asked about Creeden's skills, his location and whether he had any concerns about crossing a picket line. Creeden asked who place the picket, and the Boilermakers Union was named. Creeden indicated that he was traveling with some ''buddies'' and allegedly was told by Hollis to bring them along ''because they desperately needed welders.'' Creeden then identified himself to Hollis, whereupon Hollis pulled back, stating that he had to talk to his supervisor. Later, when Creeden called him back, Hollis stated that no more welders were needed.[70]

This allegation pushes *H. B. Zachry*, supra, to its breaking point. In this instance the refusal to hire the professional organizer took place during a strike maintained by the Union to further a cause with which Creeden had been openly and continuously identified. In my opinion, the right to maintain operations in the course of a strike[71] would be seriously compromised, were an employer, in the exercise of that right, obligated to hire a paid union functionary whose role in that capacity is inherently and unmistakably inconsistent with employment behind a picket line. Accordingly, the additional 8(a)(3) and (1) allegations involving Creeden are dismissed.[72]

7. The strikers

The complaint alleges that the above strike was caused and prolonged by the Respondent's unfair labor practices, and hence that the Respondent further violated Section 8(a)(3) and (1) by refusing to reinstate the unfair labor practice strikers upon their unconditional offer to return to work.

On April 26 an unconditional offer to return was made on behalf of the strikers. (See G.C. Exh. 9.) In light of the unfair labor practices found above, particularly the discriminatory refusal to hire from applications submitted through the Union, it is concluded that the strike was an unfair labor practice strike from its inception. No strikers were restored after termination of the strike. However, the Respondent hired others after April 19, and continued to employ them upon termination of the strike. Accordingly, it is concluded that Respondent in this respect violated Section 8(a)(3) and (1) of the Act.[73]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The union is a labor organization with the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by threatening to discharge employees because they engaged in union activity or expressed an intent to wear union insignia, by coercively interrogating employees concerning union activity, by instructing employees to refrain from union activity, by threatening that employees would not be rehired because of their union activity, by threatening not to hire union members, and by informing employees that it was interested in hiring only nonunion workers.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire from applications submitted through the Union on March 9, 17, and 25, and April 6, 1988; by issuing a reprimand to Willie Covington for engaging in union activity; and by, on April 16, discharging employees

[68] The above is based on the credited, more plausible testimony of Williford. The latter impressed as basically more reliable than Creeden, Davis, and Felter. Apart from my mistrust, the General Counsel's witnesses offered an account of the incident which reflected important inconsistencies.

[69] Creeden testified that between April 6 and 19, he called the jobsite on several occasions inquiring as to whether there were openings for welders. He claims that on those occasions when he did not identify himself, he was told that openings existed, but when he did identify himself, he was told that welders were not needed. My mistrust of Creeden is sufficiently deep to impel rejection of his testimony in this respect.

[70] Hollis' account of the conversations does not acknowledge that he told Creeden that vacancies existed or that he told him to come out, along with his ''buddies.'' In this instance, Creeden is given the benefit of the doubt. His testimony was plausible, while, on the other hand, uncertainty exists as to whether, in the face of the strike, Hollis would have been as guarded as he professed to be.

[71] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[72] There is no merit in the Respondent's general assertion that vacancies did not exist in the welder classification at this time. The record shows that eight were hired in the pressure welder classification between April 21 and April 25. See G.C. Exh. 18.

[73] The extent to which unfair labor practice strikers are entitled to participate in the remedy, set forth below, presents issues not litigated herein, but which, pursuant to understanding of the parties, have been left to resolution during compliance stages of this proceeding.

Scott E. Gibson and Charles R. Bowman, all to discourage union activity.

5. The strike which began on April 19 and ended on April 26, 1988, was an unfair labor practice strike from its inception, and the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers immediately upon their unconditional offer to return to work.

6. The above unfair labor practices are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain appropriate action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire employees named in paragraphs 9(a),[74] (b),[75] (c),[76] and (d),[77] as amended,[78] and to offer immediate reinstatement to the strikers identified in paragraph 10(c) of the complaint, it shall be recommended that they be offered immediate employment in positions for which they applied, or formerly held, as appropriate. Having found that the Respondent unlawfully discharged employees Scott E.Gibson and Charles R. Bowman, it shall be recommended that they be reinstated to their former positions, or if no longer in existence, to substantially equivalent positions. All of said discriminatees, including those named in paragraph 9 above, shall be made whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them.

Backpay under the terms of this order shall be computed on a quarterly basis, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Moreover, all reinstatement and backpay recommendations are subject to the issues deferred by agreement of the parties to the compliance process, as well as limitations available under the procedures discussed in *Dean General Contractors*, 285 NLRB 573 (1988) and *Haberman Construction Company*, 236 NLRB 79 (1978).

Having found that Willie Covington was unlawfully reprimanded for engaging in union activity, it shall be recommended that the Respondent be ordered to delete and expunge from its records any reference to that warning, notifying him specifically that this step has been taken and this disciplinary action will not in any way be used against him in the future.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[79]

ORDER

The Respondent, Sunland Construction Co., Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees by telling them that union supporters who apply for jobs will not be hired, that employees who support the Union and/or wear union insignia will be discharged.

(b) Coercively interrogating employees concerning union activity.

(c) Instructing employees to refrain from union activity.

(d) Requesting employees to supply names of nonunion employment prospects thereby implying that union craftsmen would not be considered for employment.

(e) Discouraging employees from engaging in activities on behalf of a labor organization by discharging, refusing to hire, reprimanding, or in any other manner discriminating with respect to wages, hours, or other terms and conditions or tenure of employment.

(f) Discouraging employees from engaging in activities on behalf of a labor organization by refusing to reinstate unfair labor practice strikers immediately upon their unconditional offer to return to work, or in any other manner discriminating with respect to wages, hours, or other terms and conditions or tenure of employment.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the employees listed in paragraphs 9(a), (b), (c), and (d) of the complaint, as amended, employment in positions for which they applied, or if nonexistent, to substan-

[74] There is no showing that applications were filed on behalf of W. H. Blades, W. D. Covington, Harry M. Cox, Tommy Eastwood, Sam Hodges, E. R. Hughes, J. L. McCrory, A. E. Ross, Robert W. Travis, and Ivy Williams. As to them, par. 9(a) of the complaint is dismissed with prejudice.

[75] My independent examination of the record fails to reveal that an application was filed on March 17 on behalf of Bobby Hadden. Hence his name is deleted from par. 9(b) of the complaint with prejudice.

[76] In light of a prima facie showing that applications were submitted to the Respondent on March 25 on behalf of Arthur Richardson [G.C. Exh. 7(a)] and Leon Paul Callahan [(G.C. Exh. 7(b)], the complaint is amended so as to add their names to paragraph 9(c) .

[77] In light of a prima facie showing that an application was filed on behalf of Eddie Schoonmaker [G.C. Exh. 10(q)] on April 6, 1988, the complaint is amended to reflect addition of his name to paragraph 9(d).

[78] As indicated at the hearing, the protected class of discriminatees is limited to those executing applications dated on and after March 7, 1988, unless specific evidence were offered that those dated earlier were in fact submitted to the Respondent by the Union. Based on their testimony, it is concluded that the remedial class shall include James Kenneth Beuche [G.C. Exh. 5(v)], Darryl Thomas Castleberry [G.C. Exh. 5(s)], and Charles Clardy [G.C. Exh. 5(gg)]. Excluded are James Castleberry [G.C. Exh. 5(hh)], Ferrill Alford [G.C. Exh. 5(ii)], L.J. Gara [G.C. Exh. 5(cc)], and Jeff McCrory [G.C. Exh. 13(b)], all of whom testified that they filed applications directly at the jobsite, thus precluding any assumption, that the Respondent would have identified these applications with any form of union activity. It is noted that inclusion in the protected class offers no assurance of participation in the remedy, which will be a function of the number of vacancies filled after March 9 in the relevant job classifications, rather than the number of applications.

[79] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tially equivalent positions, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Offer Scott E. Gibson and Charles R. Bowman immediate reinstatement to their former positions, or if nonexistent, to substantially equivalent positions, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Offer the unfair labor practice strikers listed in paragraph 10(c) of the complaint, immediate reinstatement to their former positions or, if nonexistent, to substantially equivalent positions, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of this decision.

(d) Remove from its files, delete, and expunge any and all reference to the unlawful termination of Gibson and Bowman as well as the reprimand issued to Willie Covington, notifying them that this action has been taken, and that said discipline will not be used against them in the future.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its jobsites in the State of Louisiana, and its office in Houston, Texas, copies of the attached notice marked ''Appendix.''[80] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[80] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees by telling them that union supporters who apply for jobs will not be hired, and that employees who support the Union and/or wear union insignia will be discharged.

WE WILL NOT coercively interrogate employees concerning union activity.

WE WILL NOT instruct employees to refrain from engaging in union activity.

WE WILL NOT request employees to supply names of nonunion applicants thereby implying that union craftsmen would not be considered for employment.

WE WILL NOT discourage employees from engaging in activities on behalf of a labor organization by discharging, refusing to hire, reprimanding, or in any other manner discriminating with respect to wages, hours, or other terms and conditions or tenure of employment.

WE WILL NOT discourage employees from engaging in activities on behalf of a labor organization by refusing to reinstate unfair labor practice strikers immediately upon their unconditional offer to return to work, or in any other manner discriminating with respect to wages, hours, or other terms and conditions or tenure of employment.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL offer the employees listed in paragraphs 9(a), (b), (c), and (d) of the complaint employment in positions for which they applied, or if nonexistent, to substantially equivalent positions, and WE WILL make them whole for any loss of earnings they may have suffered by reason of the discrimination against them.

WE WILL offer Scott E. Gibson and Charles R. Bowman immediate reinstatement to their former positions, or if nonexistent, to substantially equivalent positions, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them.

WE WILL offer the unfair labor practice strikers listed in paragraph 10(c) of the complaint reinstatement to their former positions, or if nonexistent, to substantially equivalent positions, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them.

WE WILL remove from our files, delete, and expunge any and all reference to the unlawful termination of Charles Gibson and Scott Bowman, as well as the reprimand issued to Willie Covington, notifying them that this action has been taken, and that the discipline will not be used against them in the future.

SUNLAND CONSTRUCTION COMPANY